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SECOND REPORT ON RESERVATIONS TO TREATIES

by

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CHAPTER II

UNITY OR DIVERSITY OF THE LEGAL REGIME FOR RESERVATIONS TO TREATIES (reservations to human rights treaties)

55. This chapter relates to item I of the general outline proposed on a provisional basis in chapter I above. 78/ Its object is to determine if the rules applicable to reservations to treaties, whether codified in articles 19 to 23 of the 1969 and 1986 Conventions, or customary, are applicable to all treaties, whatever their object, and in particular to human rights treaties.

(a) *Necessity and urgency of consideration of the question by the Commission*

56. As recalled above, the question was raised with some insistence both in the Commission at its forty-seventh session and in the Sixth Committee of the General Assembly at its fiftieth session. 79/ It is easy to understand these concerns.

57. Their origin doubtless lies in initiatives in respect of reservations taken recently by certain monitoring bodies established by human rights treaties, which in recent years have considered themselves entitled to assess the permissibility of reservations formulated by States to the instruments under which they are established, and, where appropriate, to draw far-reaching conclusions from such observations.

58. The origins of this development may be found in the practice of the Commission and of the European Court of Human Rights, which, in several significant decisions, have noted that a reservation (or an "interpretative declaration" which, on analysis, proves to be a reservation) was impermissible or did not have the scope attributed to it by the respondent State, and have drawn the conclusions both that the State concerned could not invoke the impermissible reservation before them and that the State was no less bound by

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78/ See para. 37.

79/ See above, paras. 10 and 12, and footnotes 19 and 22.

its ratification of the Rome Convention. 80/ The Inter-American Court of Human Rights has taken a similar position. 81/

59. The monitoring bodies established by human rights treaties concluded under United Nations auspices, traditionally cautious in this regard, 82/ have thereby been encouraged to be somewhat bolder:

The persons chairing the human rights treaty bodies have twice expressed their concern at the situation arising from reservations to treaties under their scrutiny and recommended that those bodies should draw the attention of States to the incompatibility of some of those reservations with the applicable law; 83/

The Committee on the Elimination of Discrimination against Women amended its guidelines on the preparation of initial and periodic reports by the inclusion of a section indicating the form in which States parties making reservations were to report them, 84/ and

"Welcomed the request of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, in its resolution 1992/3 on contemporary forms of slavery, to the Secretary-General:

80/ See the cases of Temeltasch v. Switzerland (European Commission of Human Rights, 5 May 1982, Yearbook of the European Convention on Human Rights, vol. 31, p. 120); Belilos v. Switzerland (European Court of Human Rights, Series A, vol. 132, p. 1, 29 April 1988), Chrysostomos et al. v. Turkey (European Commission of Human Rights, 4 March 1991, Revue universelle des droits de l'homme, 1991, p. 193); F and ML v. Austria (European Commission of Human Rights, 6 September 1994); Gradinger v. Austria (European Commission of Human Rights, 19 May 1994; European Court of Human Rights, 23 October 1995); Loizidou v. Turkey (European Court of Human Rights, Series A, vol. 310, p.1, 23 March 1995); and Fischer v. Austria (European Court of Human Rights, 26 April 1995). These decisions are analysed in more detail in sect. 3 of this chapter.

81/ Inter-American Court of Human Rights, The effect of reservations on the entry into force of the American Convention (arts. 74 and 75), advisory opinion OC-2/82 of 24 September 1982, Series A, No. 2; and Restrictions to the death penalty (arts. 4(2) and 4(4)), advisory opinion OC-3/83 of 8 September 1983, Series A, No. 3.

82/ See below sect. 3, paragraph 1.

83/ See the reports of the fourth and fifth meetings of persons chairing the human rights treaty bodies, A/47/628, 10 November 1992, paras. 36 and 60-65, and A/49/537, 19 October 1994, para. 30.

84/ See fifteenth session, 15 January-2 February 1986, Guidelines regarding the form and content of initial reports of States parties, CEDAW/C/7/Rev.2.

'To seek the views of the Committee on the Elimination of Discrimination against Women and the Commission on the Status of Women on the desirability of obtaining an advisory opinion on the validity and legal effect of reservations to the Convention on the Elimination of All Forms of Discrimination against Women [...]'

"[and] decided that it should support steps taken in common with other human rights treaty bodies to seek an advisory opinion from the International Court of Justice that would clarify the issue of reservations to the human rights treaties and thereby assist States parties in their ratification and implementation of those international instruments. Such an opinion would also help the Committee in its task of considering the progress made in the implementation of the Convention"; 85/

Above all, perhaps, the Human Rights Committee, on 2 November 1994, adopted its "General Comment No. 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant", in which it took a clear position in favour of a broad view of its own powers to examine the compatibility of such reservations and declarations with the purpose and object of the International Covenant on Civil and Political Rights. 86/

60. These positions have provoked some disquiet among States and drawn strong criticism from some of them, 87/ probably linked to the review of the question of reservations to treaties being undertaken in various forums, in particular, the Council of Europe. 88/

85/ Report of the Committee on the Elimination of Discrimination against Women, (twelfth session), A/48/38, 28 May 1993, paras. 3 and 5.

86/ See CCPR/C/21/Rev.1/Add.6, 11 November 1994.

87/ See, in particular, the extremely critical remarks on General Comment No. 24 by the United States of America, the United Kingdom (reproduced in the nineteenth Report of the Human Rights Committee to the General Assembly, A/50/40, pp. 131 and 135) and France (to appear in the 1996 Report, A/51/40).

88/ See in particular recommendation 1223 (1993) on reservations by member States to Council of Europe conventions, adopted by the Parliamentary Assembly on 1 October 1993, and the recommendation of the Committee of Ministers on the same question of 17 February 1994, and the work of the Committee of Legal Advisers on Public International Law (CAHDI) at its meeting of 21 and 22 March 1995 (cf. Meeting Report, CAHDI(95)5, paras. 23-34); at the conclusion of the meeting it was decided that "[t]he Secretariat will submit this document [i.e. a working paper submitted by the Austrian delegation, CAHDI(95)7], together with a copy of the meeting report to the Special Rapporteur of the ILC, indicating at the same time that the CAHDI takes a keen interest in this issue and was willing to contribute to the study. This item will be kept on the agenda for the Spring 1996 meeting of the CAHDI when first indications will have been received on how the ILC study was progressing".

61. It is thus certainly not redundant for the International Law Commission to take a position on these questions at an early date. The position of the Special Rapporteur, which induced him to amend somewhat the order in which he proposed to take up the questions raised in connection with the matter entrusted to him, does not spring from any desire to follow a trend.

62. While it is obviously fundamental for human rights bodies to state their views on the question, the Commission must also make heard the voice of international law 89/ in this important domain, and it would be unfortunate for it not to take part in a discussion which is of concern to the Commission above all: on the one hand, the questions raised by States and human rights bodies relate to the applicability of the rules on reservations codified by the 1969 Vienna Convention, in the drafting of which the Commission played such an influential role; on the other hand, under its statute, the Commission "shall have for its object the promotion of the progressive development of international law and its codification", 90/ meaning "the more precise formulation and systematization of rules of international law in fields where there has already been extensive State practice, precedent and doctrine". 91/ These two aspects are at the centre of the debate, one of the prerequisites being to determine whether the problem arises in terms of codification or of progressive development.

63. Given the opposing views which have emerged, the Special Rapporteur considers that the Commission might usefully seek to clarify the terms of the problem as it arises with respect to general public international law and adopt a resolution on the question which could be brought to the attention of States and human rights bodies by the General Assembly. A draft resolution along these lines is included in the conclusion of this chapter.

(b) *Object and plan of the chapter*

64. However, since the function of the International Law Commission is to contribute to the codification and progressive development of international law as a whole, and as the question of "reservations to treaties" covers treaties as a whole, it seems appropriate to resituate the specific problems raised by reservations to human rights treaties in a broader context and to consider the more general question of the unity or diversity of the legal regime or regimes applicable to reservations.

89/ In its formulation of General Comment No. 24, the Human Rights Committee did not focus its attention on the general rules of international law on reservations but on the 1966 Covenant itself; cf. the comment by Mrs. Higgins who criticized the initial draft for making excessive reference to the Vienna Convention on the Law of Treaties in comparison with the Covenant, which should be the central concern of the Committee (CCPR/C/SR.1366, para. 58).

90/ Article 1, para. 1.

91/ Article 15.

65. A first element of diversity could stem in this respect from the opposition between treaty norms laid down in articles 19 and 23 of the 1969 and 1986 Vienna Conventions 92/ and customary rules in this area. There is, however, no reason to make such a distinction: while it can doubtless be maintained that at the time of their adoption the Vienna rules stemmed, at least in part, from the progressive development of international law rather than its codification in the strict sense, that is certainly no longer true today; relying on the provisions of the 1969 Convention, confirmed in 1986, practice has been consolidated in customary norms. 93/ In any event, notwithstanding the nuances which may be ascribed to such an opinion, 94/ the concern expressed by Commission members as well as within the Sixth Committee of the General Assembly to preserve what has been achieved under the existing Conventions 95/ renders the question somewhat moot: it must be placed in the context of the norms set out in these conventions.

66. This artificial problem being set aside, the question of the unity or diversity of the legal regime governing reservations may be stated thus: do, or should, certain treaties escape application of the "Vienna regime" by virtue of their object? Should the answer be yes, to what specific regime or regimes are, or should, these treaties be subject with respect to reservations? 96/ If the treaties which are recognized by the 1969 and

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92/ It would appear prudent to leave to one side, at this stage, the problems raised by article 20 of the 1978 Vienna Convention on Succession of States in respect of Treaties; besides the fact that a consensus seems to have emerged within the Commission that it is not a priority problem (see above footnote 20), it arises in quite specific terms. Suffice to say that the question of succession to reservations (and to acceptances and objections) appears prima facie only as ancillary to the more general question of succession to the treaty itself. This being so, the Commission, when it considers the problems of succession to reservations, will perhaps need to reflect, at least incidentally, on the question of determining whether the object of a treaty plays a role in the modalities for succession to treaties. It is possible that, in the meantime, the judgment soon to be delivered by the International Court of Justice on preliminary objections raised by the Federal Republic of Yugoslavia (Serbia and Montenegro) in the case of the Application of the Convention on the Prevention and Punishment of the Crime of Genocide will offer new elements in this regard.

93/ See preliminary report (footnote 2 above) paras. 153-157.

94/ See ibid., paras. 158-162.

95/ See above, paras. 2-4 and 18-20.

96/ The problem has been put in more or less exactly these terms with regard to reservations to human rights treaties: "The basic question concerning treaties on human rights is whether or not they are to be considered as a category separate from other multilateral treaties and in particular, whether the rules on reservations [...] apply to them with equal force". (Massimo Coccia, "Reservations to Multilateral Treaties on human rights", California Western International Law Journal, 1985, p. 16).

1986 Conventions themselves as having a specific status are set apart, the problem has essentially been posed with respect to the "normative" treaties, of which it has been affirmed that they would be antinomical with the very idea of reservations (sect. 1).

67. In this view (but with the specific problem of human rights treaties still in the background), it has been remarked that the general question leads to another, more specific: "There are in effect two separate but related issues: should reservations to normative treaties be permitted, and should the validity of such reservations be assessed by a system other than that pertaining to treaties in general?" 97/ If the problem is put thus, "the reality is that we are speaking of two sorts of rules - substantive and procedural". 98/

68. These two categories of rules may be linked, and here again it may be imagined that the monitoring bodies established by certain multilateral treaties have specific powers with regard to reservations by virtue of the object of the treaty. But it may also be considered that the problem of the extent of these powers arises in many forms, independently of the object of the treaty, in all cases where a treaty instrument creates a body responsible for monitoring its implementation; in such a case, the specificity of the reservations regime would stem from the existence of the body and not from the specific characteristics of the treaty - unless it is considered that treaties establishing monitoring bodies constitute a separate category.

69. It thus appears methodologically sound to distinguish the problem of principle - substantive - of the unity or diversity of the rules applicable to reservations (sect. 2) from that - procedural - of the application of such rules, and, in particular, of the powers of monitoring bodies where they exist (sect. 3).

Section 1. Diversity of treaties and the legal regime for reservations

(a) *Limitation of the study to normative treaties*

70. Two conflicting considerations may lead to expansion or, conversely, to limitation of the scope of this chapter: on the one hand, the question of the unity or diversity of the legal regime of reservations arises with some acuteness and urgency only with regard to human rights treaties; but, on the other hand, it is the case that other categories of treaties present particular problems with regard to the nature of the applicable rules or the modalities of their application; this is very certainly true of:

- Limited treaties,

97/ Catherine Redgwell, "Universality or integrity? Some reflections on reservations to general multilateral treaties", British Yearbook of International Law, 1993, p. 279.

98/ Rosalyn Higgins, "Preface" to appear in 1996 in British Institute of International and Comparative Law, Reservations and Human Rights Treaties, p. 7 (manuscript version), underlining in the original.

- Constituent instruments of international organizations, and

- Bilateral treaties.

71. It would seem wise, however, to exclude these various categories of treaties from consideration at this stage, for both theoretical and practical reasons. While the "unity or diversity" problem is partially common to all treaties, it is also, as a logical necessity, specific to each category; after all, it is in the light of the particular features of each category that the question arises of whether common rules are applicable to all treaties or whether, on the contrary, they should be ruled out. Put differently, the problem of unity is one thing by definition, but, by the same token, the problem of diversity is many things. 99/ In other words, it may be necessary to consider each individual category separately, and there is no disadvantage in giving such consideration to certain types of treaties and not to others for the time being, since they pose different problems, at least in part.

72. Moreover, in the 1969 and 1986 Vienna Conventions themselves, limited treaties and constituent instruments of international organizations are given separate treatment which is reflected in specific rules. 100/ Reservations to bilateral treaties, meanwhile, pose very specific problems relating to the very definition of the concept of reservations, 101/ and it would probably be advantageous to address them in the chapter devoted to that definition. 102/

73. Codification treaties raise more difficult questions. The belief has occasionally been expressed that reservations to such treaties pose specific problems. 103/ However widespread, 104/ this notion is not devoid of ambiguity; the boundary between the codification of international law on the one hand and its progressive development on the other is, to say the least,

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99/ See the similar comments made by Mr. de Saram in the debate on the preliminary report, A/CN.4/SR.2404, pp. 6-7.

100/ Cf. article 20, paras. 2 and 3.

101/ Cf. the doubts expressed during the forty-seventh session of the Commission by Mr. Idris (A/CN.4/SR.2407, pp. 5-6), Mr. Kabatsi (ibid., p. 7) and Mr. Yamada (ibid., p. 11) concerning the appropriateness of the topic itself.

102/ See above, chap. I, para. 37, "Provisional general outline of the study", II (e), and para. 40.

103/ See, for example, Gérard Teboul, "Les réserves aux conventions de codification", Revue générale de droit international public, 1982, pp. 679-717, and the literature cited on p. 684, footnotes 9 and 10.

104/ See, for example, P.-H. Imbert, op. cit. (footnote 43 above), pp. 239-249, and G. Teboul, op. cit. (footnote 103 above).

unclear (assuming that it exists); 105/ many treaties contain "codification clauses", in other words, provisions which reproduce customary norms, without constituting "codification treaties" as such, since these provisions are set forth alongside others that are not of the same nature (this, incidentally, is the problem posed by numerous human rights treaties). 106/ It is quite unlikely, then, that the category of codification treaties would, in and of itself, be "operational" for the purposes of this chapter. 107/

74. Unquestionably, however, there is a need to determine whether a reservation to a customary norm repeated in a treaty provision is permissible. 108/ In keeping with the "provisional general outline" contained in chapter I above, 109/ the Special Rapporteur promises to deal more fully with this complex problem at a later stage in the study. This decision seems to him justified by the fact that what is at issue is not the subject but the dual nature (both contractual and customary) of the provision to which the reservation relates.

75. Nevertheless, the problem is clearly not wholly unrelated to the one with which this chapter deals. In the view of the Special Rapporteur, a practical approach is called for in this regard. Some of the questions being addressed at this stage are unavoidably of a "vertical" nature and relate to the entire topic under consideration; they cannot be ignored altogether, as the Commission must feel completely free to make subsequent improvements in the provisional and partial conclusions reached at the current session.

105/ Cf. The Work of the International Law Commission, United Nations, New York, 1989, pp. 15-16.

106/ See below, paras. 85-86.

107/ It is chiefly for similar reasons, moreover, that the once important distinction between "law-making treaties" and "contractual treaties" has now fallen into disfavour: "... il est certain que la plupart des traités n'ont pas un contenu homogène. Ils constituent un moule dans lequel on peut couler des dispositions qui présentent des caractères très différents; [...] Si l'on devait donc appliquer des distinctions juridiques materielles aux dispositions des traités, il faudrait de toute façon examiner leurs dispositions séparément sans pouvoir se contenter d'une analyse globale rudimentaire" (It is undeniable that most treaties do not have a uniform content. They are a mould into which provisions having very different characters can be fitted. [...] If, therefore, one were to apply material legal distinctions to the provisions of treaties, it would still be necessary to consider their provisions separately, with no possibility of limiting oneself to a rudimentary overall analysis) (Paul Reuter, op. cit. (footnote 43 above), p. 24).

108/ See preliminary report (footnote 2), paras. 143-144, and the statement made by Mr. Lukashuk during the debate on the preliminary report, A/CN.4/SR.2402, p. 15.

109/ Para. 37, IV.A. (c).

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76. Conversely, it is the conviction of the Special Rapporteur that consideration of the "vertical" problem addressed in this chapter, which runs through the whole topic of reservations to treaties, can be very beneficial for the rest of the study, by providing it with useful reference points and analysing it from a particular angle.

(b) *Normative treaties and provisions*

77. "Normative" treaties pose special problems. It is in discussing them that the academic writers have not only dwelt most heavily on the unsuitability of the general legal regime governing reservations, but have even gone so far as to assert that such instruments, by their nature, do not permit reservations. Before considering these questions, however (which are, to a large extent, separate), 110/ it is necessary to inquire into the substance and the very existence of this category of treaties.

78. According to some writers,

> "[l]es conventions multilatérales sont devenues un des moyens les plus couramment employés pour établir des règles de conduite pour l'ensemble des Etats, non seulement dans leurs relations mais aussi au profit des individus. Par ces instruments, les Etats tendent ainsi à apporter leur contribution à la formation du droit international en se faisant les interprètes d'une exigence générale de la communauté internationale." (Multilateral conventions have become one of the most common means of establishing rules of conduct for all States, not only in their relations with other States, but also in their relations with individuals. States thus tend to make their contributions to the formation of international law through such instruments, by articulating a general requirement of the international community.) 111/

> "It is this peculiarity of 'normative' Conventions, namely, that they operate in, so to speak, the absolute, and not relatively to the other parties - i.e., they operate for each party per se, and not between the parties inter se - coupled with the further peculiarity that they involve mainly the assumption of duties and obligations, and do not confer direct rights or benefits on the parties qua States, that gives these Conventions their special character." 112/

79. Treaties of this type are found in widely differing fields, such as the legal ("conventions on codification" 113/ of public and private

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110/ See paragraph 3 below.

111/ P.-H. Imbert, op. cit. (footnote 43 above), pp. 435-436; see also the extensive bibliography cited by this author, particularly footnotes 92 and 95.

112/ G. G. Fitzmaurice, "Reservations to multilateral conventions", International and Comparative Law Quarterly 1953, p. 15 (italics in original).

113/ See above, para. 73.

international law, including uniform law conventions), economic, technical, social, humanitarian, and other fields. General conventions on environmental protection usually have this character, and disarmament conventions frequently do so as well.

80. It is in the human rights field, however, that these peculiarities have most frequently come to light, 114/ the term "human rights" being understood here in the broad sense. For the purposes of this chapter, there are no grounds for distinguishing between humanitarian law on the one hand and human rights, strictly speaking, on the other; considerations which apply to one term apply just as well to the other. 115/

81. Nevertheless, even from a broad standpoint, the categorization of a treaty as a "human rights" (or disarmament or environmental protection) treaty is not always problem-free; 116/ a family law or civil status convention may contain some provisions which relate to human rights and others which do not. Moreover, assuming that this problem can be solved, two other difficulties arise.

82. First, the category of "human rights treaties" is, by all indications, far from homogeneous. "Il n'est pas possible de mettre sur le même plan [...] les Pactes des Nations Unies ou la Convention européenne, qui régissent presque tous les aspects de la vie en société et des conventions comme celles sur le génocide ou la discrimination raciale qui ne tendent à protéger qu'un seul droit". (The United Nations Covenants or the European Convention [on Human Rights], which regulate nearly all areas of life, and conventions such as those on genocide or racial discrimination, which tend to protect only a single right, cannot be placed on an equal footing.) 117/ These two subcategories of "human rights treaties" pose quite different problems as regards the definition of their object and purpose, which plays such a central role in evaluating the permissibility of reservations. 118/

114/ See below, paras. 84 and 148-152.

115/ For an outline and a justification of the distinction, see Karel Vasak, "Le droit international des droits de l'homme", Collected Courses of The Hague Academy of International Law (Collected Courses), 1974-IV, vol. 140, pp. 350 ff.

116/ See, in this regard, C. Redgwell, op. cit. (footnote 97), p. 280.

117/ P.-H. Imbert, "La question des réserves et les conventions en matière de droits de l'homme". Actes du Cinquième colloque sur la Convention européenne des droits de l'homme, (Paris, Prédone, 1982), p. 99; also published in English as "Reservations and human rights conventions", The Human Rights Review (HRR), 1981, pp. 28-60 (p. 28).

118/ See, in this regard, Jeremy McBride, "Reservations and the capacity to implement human rights treaties", forthcoming in op. cit. (footnote 98 above), p. 32 (manuscript version), and William A. Schabas, "Reservations to human rights treaties: time for innovation and reform", Annuaire canadien de droit international, 1995, p. 48.

83. Second, within a single treaty, clauses that vary greatly in their "importance" (which, legally speaking, can be reflected in whether they are binding or non-binding and whether they may or may not be derogated from), 119/ their nature (customary or non-customary) 120/ or their substance ("normative" or contractual) can be set forth side by side. While all these factors have a bearing on the question under consideration, 121/ it is clearly this last factor, the "normative" character attributed to human rights treaties, which has the greatest impact.

84. According to a widely held view, the main peculiarity of such treaties is that their object is not to strike a balance between the rights and advantages which the States parties mutually grant to one other, but to establish common international rules, reflecting shared values, that all parties undertake to observe, each in its own sphere. As the International Court of Justice stated forcefully, with regard to the Convention on the Prevention and Punishment of the Crime of Genocide:

> "In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties." 122/

85. It is, however, necessary to beware of taking an overly straightforward and simplistic view of things. While, as a rule, provisions that protect human rights have a marked "normative" character, human rights treaties also include typically contractual clauses. Awkward as this may be, the "Hague law" applicable to the conduct of warring parties in armed conflicts remains fundamentally contractual, and the 1899 and 1907 Conventions are still applied on a reciprocal basis (despite the lapsing of the celebrated "si omnes" clause); 123/ similarly, the inter-State application machinery established

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119/ See, on this point, the moderate position taken by the Human Rights Committee in its General Comment No. 24, cited above (footnote 86 above), para. 10, and the commentary by J. McBride, op. cit. (footnote 119 above), pp. 33-34; see also P.-H. Imbert, op. cit. (footnote 117 above), pp. 105-106 (HRR 1981, pp. 31-32).

120/ See above, paras. 73 and 74.

121/ See below, sect. 2, paragraph 1.

122/ Advisory opinion cited above (footnote 46 above), p. 23; see also below, paras. 148-152.

123/ See, on this point, P.-H. Imbert, op. cit. (footnote 43 above), pp. 256-257.

by article 24 of the European Convention on Human Rights 124/ and article 45 of the Inter-American Human Rights Convention is based on reciprocity, and it has even been possible, in speaking of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, to state that it

> "contains stipulations of a normative character and stipulations of a contractual character. However, as is clear from its text and from the whole history of United Nations dealing with the problem of genocide, the intention of its framers was equally to codify, at least in part, substantive international law and to establish international obligations to facilitate international cooperation in the prevention and punishment of the crime. Consequently, the Convention cannot be regarded as a single indivisible whole, and its normative stipulations are divisible from its contractual stipulations." 125/

86. Here again, the problem does not seem to have been posed in the proper terms. While this has been done with respect to "human rights treaties", all that is involved is "human rights clauses" of a normative character, or, more broadly, "normative clauses", regardless of the subject of the treaty in which they are articulated.

87. Indeed, while it is clear that human rights treaties display these characteristics in a particularly striking way, it must also be recognized that they are not unique in doing so. The same is true of most environmental protection or disarmament treaties and, in a broader sense, all "normative" treaties by which the parties enact uniform rules which they undertake to apply.

88. Naturally, this observation does not obviate the need to inquire whether there are subcategories within this category - if it does in fact have legal status - which pose specific problems with regard to reservations and, in particular, whether human rights treaties pose such problems. Nevertheless, thinking must start from more general premises, unless conclusions are to be posited at the outset of the process. Hence, while human rights treaties will be emphasized for the reasons outlined above, 126/ the body of law-making multilateral treaties will form the broader focus of this chapter.

124/ See P.-H. Imbert, op. cit. (footnote 109 above), p. 115 (HRR 1981, p. 36).

125/ Statement made by Mr. Shabtai Rosenne on behalf of the Government of Israel during consideration of the request by the General Assembly for an advisory opinion concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice, Pleadings, Oral Arguments, Documents, 1951, p. 356; see also Tullio Scovazzi, Esercitazioni di diritto internazionale, (Milan, Giuffrè, 1994), pp. 69-71. Likewise, in a Memorandum concerning the "Admissibility of reservations to general conventions" submitted to the Council of the League of Nations on 15 June 1927, the Director of the International Labour Office noted that international conventions "appear to be legal instruments partaking of the nature both of a law and of a contract" (League of Nations, Official Journal, July 1927, p. 883).

126/ Under letter (a) above, paras. 56-63.

Section 2. Unity of the main rules applicable to reservations

89. The adaptation to normative multilateral treaties of the "Vienna rules" relating to reservations cannot be evaluated in the abstract. It must be viewed in the light of the functions assigned to reservations regimes and the intentions of their authors.

Paragraph 1. *Functions of the legal regime of reservations*

90. "Deux intérêts contradictoires sont en cause. Le premier intérêt est l'extension de la convention. On désire que cette convention rasse la loi pour le plus grand nombre d'Etats possible et, par conséquent, on accepte les aménagements qui permettront d'obtenir le consentement d'un Etat. L'autre préoccupation est celle de l'intégralité de la Convention: les mêmes règles doivent être valables pour toutes les parties; on n'a pas intérêt à avoir un régime conventionnel dans lequel il y aura des lacunes ou des exceptions, dans lequel les règles varieront suivant les Etats considérés." (Two opposing interests are at stake. The first interest is the extension of the convention. It is desirable for this convention to be ratified by the largest possible number of States; consequently, adjustments which make it possible to obtain the consent of a State will be accepted. The other concern relates to the integrity of the Convention. The same rules must apply to all parties; there is no point in having a treaty regime that has loopholes or exceptions, in which the rules vary according to the States concerned.) 127/ The function of the rules applicable to reservations is to strike a balance between these opposing requirements: on the one hand, the search for the broadest possible participation; on the other hand, the preservation of the ratio contrahendi (ground of covenant), which is the treaty's reason for being. It is this conflict between universality and integrity which gives rise to all reservations regimes, 128/ be they general (applicable to all treaties which do not provide for a specific regime) or particular (established by express clauses incorporated into the treaty).

127/ Suzanne Bastid, Les traités dans la vie internationale - conclusions et effets (Paris, Economica, 1985), pp. 71-72.

128/ See, in this regard, B. T. Halajczuk, "Les conventions multilatérales entre l'universalité et l'intégrité", Revue de droit international, de sciences diplomatiques et politiques, 1960, pp. 38-50 and 147-158; J. M. Ruda, op. cit. (footnote 43 above), p. 212; John King Gamble Jr., "Reservations to multilateral treaties: a macroscopic view of State practice", American Journal of International Law (AJIL), 1980, pp. 372-373; Catherine Logan Piper, "Reservations to multilateral treaties: the goal of universality", Iowa Law Review, 1985, pp. 295-322, particularly pp. 297, 305 and 317; Rebecca J. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women", Virginia Journal of International Law, 1990, pp. 683-684 and 686; Samuel K. N. Blay and B. Martin Tsamenyi, "Reservations and declarations under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees", International Journal of Refugee Law, 1990, p. 557; Patrick Daillier and Alain Pellet, Droit international public (Nguyen Quoc Dinh) (Paris, Librairie générale de droit de jurisprudence, fifth edition, 1994), p. 178; etc.

91. As far as human rights treaties are concerned, Judge Rosalyn Higgins has expressed the problem in the following terms: "The matter is extremely complex. At the heart of it is the balance to be struck between the legitimate role of States to protect their sovereign interests and the legitimate role of the treaty bodies to promote the effective guarantee of human rights." 129/

92. The first of these requirements, universality, militates in favour of widely expanding the right of States to formulate reservations, which clearly facilitates universal participation in "normative" treaties. And the same applies with respect to human rights: "... the possibility of formulating reservations may well be seen as a strength rather than a weakness of the treaty approach, in so far as it allows a more universal participation in human rights treaties". 130/

93. Nevertheless, such freedom on the part of States to formulate reservations cannot be unlimited. It clashes with another, equally pressing requirement - preserving the very essence of the treaty. For instance, it is absurd to believe that a State could become a party to the Genocide Convention while objecting to the application of articles I, II and III, i.e., the only substantial clauses of the Convention.

94. The problem can also be posed in terms of consent. 131/

95. By its very definition, the law of treaties is consensual. "Le traité lie les Etats parce que ceux-ci ont voulu par lui être liés. Le traité est donc un acte juridique, mettant en oeuvre des volontés humaines." (Treaties are binding on States because States have wished to be bound by them. A treaty is thus a legal instrument which implements human wishes.) 132/ States are bound by treaties because they have undertaken - because they have consented - so to be bound. They are free to make this commitment or

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129/ Op. cit. (footnote 98 above), p. 1 (manuscript version).

130/ M. Coccia, op. cit. (footnote 96 above), p. 3. The author refers to O. Schachter, M. Nawaz and J. Fried, Toward Wider Acceptance of United Nations Treaties, 148 (1971), and adds: "This UNITAR study shows statistically that 'the treaties ... which permit reservations, or do not prohibit reservations, have received proportionally larger acceptance than the treaties which either do not permit reservations to a part or whole of the treaty, or which contain only one substantial clause, making reservations unlikely'."

131/ See the first report by Hersch Lauterpacht on the law of treaties, in which he explains that the problem of consent "is a question closely, though indirectly, connected with that of the intrinsic justification of reservations...." (Yearbook ... 1953, A/CN.4/63, p. 125).

132/ Paul Reuter, op. cit. (footnote 43 above), pp. 20-21.

not, and they are bound only by obligations which they have accepted freely, with full knowledge of the consequences. 133/ "No State can be bound by contractual obligations it does not consider suitable." 134/

96. The same applies to reservations: "The fundamental basis remains, that no State is bound in international law without its consent to the treaty. This is the starting-point for the law of treaties, and likewise for our international rules dealing with reservations." 135/ As the International Court of Justice has stated:

> "It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto." 136/

Likewise, in the arbitration of the dispute between France and the United Kingdom with regard to the Mer d'Iroise Continental Shelf, the Tribunal emphasized the need to respect the "principle of mutuality of consent" in evaluating the effects of reservations. 137/

133/ Unless they are otherwise bound, but this is a different problem. See also, in this regard, the statement made by the United States representative in the Sixth Committee during the fiftieth session of the General Assembly (A/C.6/50/SR.13, para. 53).

134/ Christian Tomuschat, "Admissibility and legal effects of reservations to multilateral treaties - comments on articles 16 and 17 of the International Law Commission's 1966 Draft Articles on the Law of Treaties", Zeitschrift für ausländisches öffentliches Recht, 1967, p. 466. See, for example, in this regard, Permanent Court of International Justice, judgment of 17 August 1923, ss "Wimbledon" case, Series A, No. 1, p. 25, and International Court of Justice, advisory opinion of 11 July 1950, International Status of South-West Africa, Reports, 1950, p. 139.

135/ William W. Bishop, Jr., "Reservations to treaties", Collected Courses, 1961 II, vol. 103, p. 255.

136/ International Court of Justice, opinion cited above (footnote 46 above), Reports, 1951, p. 21. The authors of the dissenting opinion express this idea still more strongly: "The consent of the parties is the basis of treaty obligations. The law governing reservations is only a particular application of this fundamental principle, whether the consent of the parties to a reservation is given in advance of the proposal of the reservations or at the same time or later" (ibid., p. 32). Moreover, it is clear that the majority and the dissenting Judges held very divergent views on the way in which consent to a reservation should be expressed, but this difference does not affect the "principle of mutuality of consent" (see footnote 137 below), and it seems debatable to assert, as some eminent writers do, that in the opinion of the majority (which is the source of the Vienna regime), "le principe même du consentement est ébranlé" (the very principle of consent has been shaken) (P.-H. Imbert, op. cit. (footnote 43 above), p. 69; see also pp. 81 and 141 ff.).

137/ Award of 30 June 1977, paras. 60 and 61, Reports of International Arbitral Awards, vol. XVIII, p. 42.

97. The rules applicable to reservations must therefore strike a dual balance between (a) the requirements of universality and integrity of the treaty and (b) the freedom of consent of the reserving State and that of the other States parties, it being understood that these two "dialectical pairs" overlap to a large extent.

98. In the light of these requirements, it is necessary to inquire whether the legal regime for reservations envisaged by the 1969 and 1986 Vienna Conventions is generally applicable, and, in particular, whether it is suited to the particular natures of normative treaties (or, more specifically, of the "normative clauses" articulated in general multilateral treaties). 138/ As a first step, it can be determined that the authors of this regime showed themselves to be mindful of these requirements, and that they intended to adopt generally applicable rules to satisfy them.

Paragraph 2. *A regime designed for general application*

99. Since the very beginning of its work on reservations, the Commission has been aware of the need to strike the above-mentioned dual balance 139/ between the requirements of universality and integrity on the one hand and, on the other, between respect for the wishes expressed by the reserving State and that of the other parties, although the Commission has taken a number of very different positions as to the best way of achieving such a balance.

100. In accordance with its position of principle in favour of the rule of unanimity, the first report by James L. Brierly merely stresses the need for consent to the reservation, while admitting - and this is in itself an element of flexibility - that such consent could be implicit. 140/ However, beginning the following year, in response to the General Assembly's invitation to the Commission to study the question of reservations to multilateral conventions, 141/ the Special Rapporteur fully discussed the question:

> "In approaching this task it would appear that the Commission has to bear in mind two main principles. First there is the desirability of maintaining the integrity of international multilateral conventions. It is to be preferred that some degree of uniformity in the obligations of all parties to a multilateral instrument should be maintained. [...]

138/ See below, paras. 73-74 and 85-86; in the rest of this report, the two terms are used interchangeably.

139/ See above, para. 97.

140/ Yearbook ... 1950, vol. II, p. 224.

141/ General Assembly resolution 478 (V) of 16 November 1950; see preliminary report (footnote 2 above), para. 14.

> Secondly, and on the other hand, there is the desirability of the widest possible application of multilateral conventions. [...] If they are to be effective multilateral conventions must be as widely in force or as generally accepted as possible." 142/

101. The Commission agreed with the Special Rapporteur on this question but at the same time was somewhat uneasy:

> "When a multilateral convention is open for States generally to become parties, it is certainly desirable that it should have the widest possible acceptance. [...] On the other hand, it is also desirable to maintain uniformity in the obligations of all the parties to a multilateral convention, and it may often be more important to maintain the integrity of a convention than to aim, at any price, at the widest possible acceptance of it." 143/

Faced with this dilemma,

> "The Commission believes that multilateral conventions are so diversified in character and object that, when the negotiating States have omitted to deal in the text of a convention with the admissibility or effect of reservations, no single rule uniformly applied can be wholly satisfactory." 144/

It concludes, none the less,

> "that its problem is not to recommend a rule which will be perfectly satisfactory, but that which seems to it to be the least unsatisfactory and to be suitable for application in the majority of cases." 145/

it being understood that this rule can always be rejected, since States and international organizations are invited to "consider the insertion [in multilateral conventions]" of provisions relating to reservations. 146/

102. It does not make much difference which system is decided on at this stage. It is significant that, the Commission, while perfectly aware of the diversity of situations, has shown a firm determination since the outset to separate out a single, unique system of ordinary law, one that does the least possible harm and can be applied in all cases where the treaty is silent.

142/ A/CN.4/41, paras. 11-12. See also ibid., para. 16.

143/ Yearbook ... 1951, A/1858, para. 26.

144/ Ibid., para. 28.

145/ Ibid.

146/ Ibid., para. 28.

103. The reports submitted by Hersch Lauterpacht in 1953 and 1954 are written along the same lines. 147/ However, it is important to note that after a long section on the debates concerning reservations in the draft 148/ Covenant on Human Rights, 149/ the Special Rapporteur on the law of treaties concluded that it was incumbent on the General Assembly to choose a suitable system, and that the great variety of existing practice suggested "that it is neither necessary nor desirable to aim at a uniform solution"; he nevertheless went on to say:

> "What is both necessary and desirable is that the codification of the law of treaties shall contain a clear rule for the cases in which the parties have made no provision on the subject". 150/

104. The only report in which Fitzmaurice dealt with the question of reservations is the first one, submitted in 1956. 151/ It is of twofold interest with regard to the problem at issue here:

1. Endorsing the views of his predecessor, the Special Rapporteur felt that

> "even as a matter of lex lata, the strict traditional rule about reservations could be regarded as mitigated in practice by the following considerations which, taken together, allow an appreciable amount of latitude to States in this matter, and should meet all reasonable needs", 152/

thus reaffirming the idea that flexibility is a gauge of adaptability.

2. In addition, Fitzmaurice again pointed out the difference noted in an article published in 1953 153/ between "treaties with restricted participation" on the one hand and, on the other, "multilateral treaties". 154/

147/ See preliminary report (footnote 2 above), paras. 23-29.

148/ The only one at the time.

149/ A/CN.4/87, commentary on draft article 9, pp. 28-34.

150/ Ibid., p. 34.

151/ See preliminary report (footnote 2 above), paras. 30-33.

152/ Yearbook ... 1956, vol. II, A/CN.4/101, para. 92, p. 126.

153/ Op. cit. (footnote 112 above), p. 13.

154/ Yearbook ...1956, vol. II, paras. 97-98, p. 127. Note, however, that while Fitzmaurice spoke expressly in the above-mentioned article about "conventions of the 'normative' types" (ibid.), he did not use that expression in his report.

105. This distinction, mentioned again in 1962 by Sir Humphrey Waldock in his first report, 155/ is the direct source of the current provisions of paragraphs 2 and 3 of the 1969 and 1986 conventions. This result was not without its problems, however. The lengthy discussions on the Special Rapporteur's suggestions 156/ bear witness to profound differences on this point among the members of the Commission. The controversy was mainly about the validity of the exception to the general rule, as proposed by the Special Rapporteur and discussed in another form by the Drafting Committee, concerning "multilateral treaties concluded by a restricted group of States". 157/ Summarizing the debate, the Special Rapporteur noted that two courses were open to the Commission:

> "One was to draw a distinction between general multilateral treaties and other multilateral treaties; the other was to draw a distinction between treaties which dealt with matters of concern only to a restricted group of States and treaties which dealt with matters of more general concern." 158/

106. The first of these two courses was defended by some members, 159/ while others, even more clearly, asked expressly that the criterion of the object of the treaty should be reintroduced. 160/ These views, strongly opposed by other members, 161/ none the less remained minority views and, after referral to the Drafting Committee, they were ultimately rejected. In its report, the Commission merely stated the following:

> "... the Commission also decided that there were insufficient reasons for making a distinction between multilateral treaties not of a general character between a considerable number of States and general multilateral treaties. The rules proposed by the Commission therefore

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155/ Yearbook ... 1962, vol. II, A/CN.4/144, draft articles 17, para. 5, and 18, para. 3 (b).

156/ For a brief discussion of these debates, see the preliminary report (footnote 2 above), paras. 43-45.

157/ See especially Yearbook ... 1962, vol. I, pp. 229-237.

158/ Ibid., p. 233.

159/ See ibid., the positions of Verdross (642nd meeting, para. 56) or Waldock (p. 77).

160/ See ibid., the positions of Jiménez de Aréchaga (p. 78), Yaseen (p. 83) or Bartoš (p. 82).

161/ See especially the very firm position of Ago, ibid., pp. 79-80.

cover all multilateral treaties, except those concluded between a small number of States, for which the unanimity rule is retained." 162/

107. Neither the States in their commentaries on the draft articles nor the Commission itself ever returned to this point, 163/ and in 1966, in its final report on the law of treaties, the Commission used the same formula - almost word-for-word - as in 1962:

"... The Commission also decided that there were insufficient reasons for making a distinction between different kinds of multilateral treaties other than to exempt from the general rule those concluded between a small number of States for which the unanimity rule is retained." 164/

108. The problem resurfaced briefly during the Vienna Conference after the United States of America proposed an amendment which sought to introduce the nature of the treaty as one of the criteria to be taken into consideration in determining whether a reservation was permissible. 165/ Supported by some States 166/ and opposed by others, 167/ the proposal was sent to the Drafting Committee, 168/ which rejected it. 169/ The Conference does

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162/ Yearbook ... 1962, vol. II, A/5209, p. 180. See also pp. 178 and 181.

163/ Except in passing; see the statement by Briggs during the 1965 debates, Yearbook ... 1965, vol. I., p. 177.

164/ Yearbook ... 1966, vol. II, A/6309/Rev.1, p. 223. At the forty-seventh session, Mr. de Saram drew attention to this sentence (A/CN.4/SR.2404, p. 6); see also the position of Mr. Rao (ibid., pp. 19-20) and that of the United States of America during the Sixth Committee debate (A/C.6/50/SR.13, p. 6, para. 50).

165/ A/CONF.39/C.1/L.126 and Add.1.

166/ Cf. United Nations Conference on the Law of Treaties, first session, Vienna, 26 March - 24 May 1968, Official Records, summary records of plenary meetings and meetings of the Committee of the Whole: United States of America (pp. 118 and 141-142), Spain (p. 119) and China (p. 131), (all page numbers refer to the French text).

167/ Cf. ibid.: Ukrainian SSR (p. 125), Poland (p. 128), Ghana (p. 130), Italy (p. 131), Hungary (p. 132), Argentina (p. 140) or the USSR (p. 146) (all page numbers refer to the French text).

168/ See ibid., p. 147 of the French text.

169/ See the reaction of the United States of America in United Nations Conference on the Law of Treaties, second session, Vienna, 9 April-22 May 1969, Official Records, summary records of plenary meetings and meetings of the Committee of the Whole, p. 37 of the French text.

not seem to have discussed the view expressed by the World Health Organization that draft article 19 170/ should be "interpreted as authorizing reciprocity only to the extent to which it is compatible with the nature of the treaty and of the reservation". 171/

109. The travaux préparatoires for the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations do not reflect the substantive debate on this question. At the most, one can observe that, after some discussion, 172/ the International Law Commission disregarded the wishes of certain members to have a special regime for reservations by international organizations; in its 1982 report it stated:

> "After a thorough review of the problem, a consensus was reached in the Commission which, choosing a simpler solution than the one it had adopted in first reading, assimilated international organizations to States for the purposes of the formulation of reservations". 173/

110. Bringing the regime of reservations to treaties to which international organizations are parties into line with the regime applicable to treaties involving only States was highlighted once again at the 1986 Vienna Conference. 174/ Here the fundamental unity of the reservation regime laid out in the two Vienna Conventions was made complete and confirmed, the sole exceptions being certain treaties concluded between a limited number of States and constituent instruments of international organizations. 175/

111. The documents tracing the drafting of the 1969 and 1986 Conventions leave no doubt whatsoever: the International Law Commission and, later, the codification Conferences deliberately, and after a thorough debate, sought to establish a single regime applicable to reservations to treaties regardless of their nature or their object. The Commission did not set out with any preconceived ideas to this end; as it clearly stated in 1962 and in 1966, 176/ it had observed that there were no specific reasons for proceeding differently - and it is interesting to note, first, that the Commission adopted this reasoned position by looking specifically at the

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170/ Became article 21.

171/ Analytical compilation comments and observations made in 1966 and 1967 with respect to the final draft Articles on the Law of Treaties, A/CONF.39/5 (vol. I), p. 166.

172/ See preliminary report (footnote 2), paras. 72-85.

173/ Yearbook ... 1982, vol.II, p. 34.

174/ See preliminary report (footnote 2), paras. 87 and 88.

175/ See above, para. 72.

176/ See above, paras. 106 and 107.

regime governing reservations to human rights treaties 177/ and, second, that in the two cases in which it felt special rules were needed on certain points, it did not hesitate to derogate from the general regime. 178/

Paragraph 3. *The legal regime of reservations is generally applicable*

112. This argument is a familiar one. Whatever manifestation it takes, it holds that, given the importance of normative treaties for the international community as a whole, reservations to such instruments must be excluded, or at least discouraged, whereas the "flexible system" of the 1969 and 1986 Conventions unduly facilitates their formulation and amplifies their effects.

113. However, it is doubtless a matter of good doctrine to draw a distinction between two separate problems even if they are related: the very general problem of whether or not reservations to such instruments are appropriate and the more technical question of determining whether the "Vienna regime" addresses the various concerns expressed. But if the answer to the first question cannot be objective and depends far more on political - indeed, ideological - preferences than on legal technicalities, the latter considerations in turn make it possible to take a firm position with regard to the second question. And the two can in fact be considered separately.

A. A debate with no possible conclusion: the appropriateness of reservations to normative treaties

114. The terms of the debate are clearly evident in the opposition between the majority and the dissenting judges in the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide case. The former held that:

> "The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which voted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis". 179/

For the minority judges, on the other hand,

> "It is [...] not universality at any price that forms the first consideration. It is rather the acceptance of common obligations - keeping step with like-minded States - in order to attain a high objective for all humanity, that is of paramount importance. [...]

177/ Particularly with regard to the International Covenants on Human Rights; see above, para. 103 and footnote 147.

178/ Cf. article 20, paragraphs 2 and 3, of the 1969 and 1986 Conventions.

179/ Advisory opinion (footnote 46), Reports, 1951, p. 24.

In the interests of the international community, it would be better to lose as a party to the Convention a State which insists in face of objections on a modification of the terms of the Convention, than to permit it to become a party against the wish of a State or States which have irrevocably and unconditionally accepted all the obligations of the Convention". 180/

"These ['multilateral conventions of a special character'181/], by reason of their nature and of the manner in which they have been formulated, constitute an indivisible whole. Therefore, they must not be made the subject of reservations, for that would be contrary to the purposes at which they are aimed, namely, the general interest and also the social interest." 182/

115. This marked opposition of points of view elicits three observations:

- It arises at the outset of the controversy in connection with a human rights treaty par excellence, which as such falls in the sub-category of normative treaties, the category around which the debate has recently resurfaced; 183/

- The two "camps" start from exactly the same premises (the aims of the Convention, which are pursued in the interest of all mankind) to reach radically opposing conclusions (reservations to the Convention must/must not be permitted);

- Everything was said in 1951; the ensuing dialogue of the deaf has gone on unabated for 45 years without either side displaying any fundamental change in its position.

116. As there is no possible way of ending the debate, let us content ourselves with setting out the undisputed facts. 184/

117. Reservations to "normative" treaties are deleterious because:

- Permitting them is tantamount to encouraging partial acceptance of the treaty 185/

180/ Joint dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo. Ibid., p. 47.

181/ Dissenting opinion of Judge Alvarez, ibid., p. 51.

182/ Ibid., p. 53.

183/ See above, paras. 56-62.

184/ Subject to the more technical aspects of the debate, see sect. B below.

185/ G. G. Fitzmaurice, op. cit. (footnote 112 above), pp. 17 and 19-20.

- And less careful drafting, since the parties can in fact modify their obligations later; 186/

- The accumulation of reservations ultimately voids these treaties of any substance where the reserving State is concerned 187/

- And, in any event, compromises their quasi-legislative functioning and the uniformity of their implementation. 188/

118. More specifically, as regards human rights treaties,

- There is "une contradiction entre les deux expressions 'reserves' et 'droits de l'homme'. On conçoit mal qu'un Etat qui a accepté de se lier par un traité en cette matière n'ait pas tout fait pour être en mesure de remplir toutes ses obligations, [...] veuille encore se protéger par un 'domaine reservé'". (A contradiction exits between the terms "reservations" and "human rights". It is hard to believe that a State that agreed to be bound by a treaty in this area would not do everything it could to fulfil its obligations, [...] yet seek to protect itself by means of a "reserved domain"; 189/

- It would be "desirable in principle that States accept the full range of obligations, because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being"; 190/

186/ Ibid., p. 19.

187/ Cf. W. A. Schabas, op. cit. (footnote 118 above), p. 41.

188/ Cf., in the area of environmental protection, Gwyneth G. Stewart, "Enforcement problems in the endangered species Convention: reservations regarding the reservation clause", Cornell International Law Journal, 1981, p. 438, and, albeit indirectly, in the field of disarmament, Pascal Boniface, Les sources du désarmement, (Paris, Economica, 1989), p. 68.

189/ P.-H. Imbert, op. cit. (footnote 117 above), p. 99 (HRR, 1981, p. 28); see also M. Coccia, op. cit. (footnote 96 above), p. 16; both authors endorse this opinion but do not claim it as their own. See also the position of Mr. Robinson during the debate on the preliminary report (A/CN.4/SR.2402, pp. 11 and 12).

190/ See the Human Rights Committee, General Comment No. 24 (footnote 86, above), para. 4.

- Accompanying ratification with a series of reservations could give the reserving State an opportunity to enhance its international "image" at little cost without having to really accept any restrictive commitments. 191/

119. Conversely, it is argued that:

- Reservations are a "necessary evil" 192/ resulting from the current state of international society; they "cannot be qualified at the ethical level; they reflect a fact, namely that there are minorities whose interests are as respectable as those of majorities"; 193/

- More positively, they are an essential condition of life, of the dynamics of treaties 194/ that promotes the development of international law in the process; 195/

- By facilitating the conclusion of multilateral conventions; 196/ and

- By allowing a greater number of States to become parties; 197/

191/ See R. P. Anand, "Reservations to multilateral treaties", Indian Journal of International Law, 1960, p. 88; P.-H. Imbert, op. cit. (footnote 43 above), p. 249; and W. A. Schabas, op. cit. (footnote 118 above), p. 41.

192/ R. Ago, Yearbook ... 1965, vol. I, p. 151.

193/ Paul Reuter, fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations, A/CN.4.285, Yearbook ... 1975, vol. II, p. 36.

194/ P.-H. Imbert, op. cit. (footnote 43 above), p. 463.

195/ Ibid., p. 464.

196/ International Court of Justice, advisory opinion (footnote 46 above), Reports, 1951, p. 22. See also the position of Mr. Rao during the debate on the preliminary report (A/CN.4/SR.2404, pp. 18-19).

197/ Cf. for example Manfred Lachs, "Le développement et fonctionnement des traités multilatéraux", Collected Courses, 1957 II, vol. 92, pp. 229-230. See also the views expressed during the debate on the preliminary report by Mr. Villagran Kramer (A/CN.4/SR.2403, p. 8) and Mr. Elaraby ("In a sense, reservations were the price paid for broader participation", A/CN.4/SR.2404, p. 16) and, in the area of the environment, G. G. Stewart, op. cit. (footnote 188 above), p. 436.

- Since, ultimately, partial participation is better than no participation at all. 198/

120. These considerations carry even more weight in the area of human rights:

- "The possibility of entering reservations may encourage States which consider that they have difficulties in guaranteeing all the rights in [such treaties] none the less to accept the generality of obligations in that instrument"; 199/

- "Indeed, it could be argued that there is a particular need for a margin of flexibility in respect of human rights treaties which tend to touch on matters of particular sensitivity to States ..."; 200/

- Particularly when the terms of the convention are backed up by a monitoring mechanism which ensures a dynamic interpretation of the instrument; 201/

- The formulation of reservations would seem to constitute proof that States take their treaty obligations seriously; and

- Gives them an opportunity to harmonize their domestic law with the requirements of the convention while obligating them to abide by the most important provisions;

198/ This is what Fitzmaurice called, speaking in highly critical terms, "the half-a-loaf doctrine" (op. cit. (footnote 112 above), p. 17): "...that in any case half a loaf is better than no bread - that it is better (especially as regards the law-making, social and humanitarian type of Convention) that States should become parties even if they cannot (or will not) carry out certain of the obligations involved, and that they should be bound by at least some of the obligations of the Convention, even if they disengage themselves from the rest", (ibid., p. 11). For examples in a similar vein, see Charles de Visscher, Théories et réalités en droit international public, Paris, Pédone 1970, pp. 292-293, or P.-H. Imbert, op. cit. (footnote 43 above), p. 372 or p. 438.

199/ Human Rights Committee, General Comment No. 24, (footnote 86 above), para. 4.

200/ C. Redgwell, op. cit. (footnote 97 above), p. 279; see also P.-H. Imbert, op. cit. (footnote 117 above), pp. 102-103 (HRR 1981, p. 30). Thomas Giegrich shows how "kulturellen Relativismus" (cultural relativism) is often invoked in the area of human rights ("Vorbehalte zu Menschenrechtsabkommen: Zulässigkeit, Gültikeit und Prüfungskompetenzen von Vertragsgremien - Ein konstitutioneller Ansatz", pp. 713-715, English summary pp. 778-779). See also the position of Mr. Rao during the debate on the preliminary report (A/CN.4/SR.2404, pp. 18-19).

201/ P.-H. Imbert, ibid.

- Especially since the implementation of human rights treaties tak time; 202/ and

- Takes more resources, particularly financial resources, than it would appear at first. 203/

121. Similarly, it is argued that the usefulness of reservations in the are of human rights is borne out concretely by the fact that very few convention concluded in this area exclude reservations 204/ and that this option is available even when a treaty is concluded among a small number of States. 205/ It is also obvious that the periodic calls for withdrawal of reservations to human rights treaties elicit only a faint response, 206/ which would seem to point up the usefulness of such reservations.

122. The same authors maintain that in reality, the scope of reservations to law-making treaties, including those in the field of human rights, is limited, 207/ a view contested by the doctrine opposing the use of

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202/ Cf. J. McBride, op. cit. (footnote 118 above), pp.2-4 (manuscript version). See also the position of Mr. Rao during the debate on the preliminary report (A/CN.4/SR.2404, pp. 18-19).

203/ See J. McBride, ibid., pp. 4-13.

204/ See para. 124 below.

205/ As in the case of the Council of Europe; cf. article 64 of the European Convention on Human Rights (see P.-H. Imbert, op. cit. (footnote 11 above), p. 119; HRR 1981, p. 38).

206/ Cf. the response dated 17 February 1994 from the Committee of Ministers of the Council of Europe concerning Parliamentary Assembly recommendation 1223 (1993); see also Belinda Clark, "The Vienna Convention reservations regime and the Convention on Discrimination against Women", American Journal of International Law 1991, p. 288.

207/ Cf. M. Coccia, op. cit. (footnote 96 above), p. 34; J. K. Gamble, op. cit. (footnote 128 above), pp. 372-394, passim; P.-H. Imbert, op. cit. (footnote 43 above), pp. 347 ff., and op. cit. (footnote 117 above), p. 105 (HRR 1981, p. 31); Dinah Shelton, "State practice on reservations to human rights treaties", Annuaire canadien des droits de la personne 1983, pp. 205-234, passim, note pp. 225-227; Markus G. Schmidt, "Reservations to United Nations human rights treaties - the case of the two Covenants", to be included in op. cit. (footnote 98 above), pp. 18-20 (manuscript version), or Sir Ian Sinclair, The Vienna Convention on the Law of Treaties (Manchester University Press), 1984, p. 77.

reservations. 208/ Again, the question is one of appreciation, and this serves merely to confirm that there can be no objective answer to the question of whether the drawbacks of reservations to these instruments outweigh their advantages or vice versa.

123. The "truth" probably lies somewhere in between; everything depends on the circumstances and the purpose of the provisions in question. However, leaving the question unanswered presents few drawbacks: it is true that the first subparagraph of article 19 of the Vienna Conventions on the law of treaties sets out the principle of the right to formulate reservations; however, like all rules governing reservations (and like the vast majority of other rules) set out in these Conventions, this is an optional residual rule which negotiators can reject if they find it useful to do so. If they feel that the treaty does not lend itself to the formulation of reservations, they need only insert a clause expressly excluding them, which is precisely the case contemplated in article 19, subparagraph (a).

124. It is remarkable, however, that such provisions should be so rare in normative human rights treaties; 209/they seem to be equally rare in disarmament treaties. 210/

125. This infrequency of clauses prohibiting reservations would seem to be explained by the ordinary-law regime laid down in the Vienna Conventions which is applied owing to the frequent silence 211/ of these treaties on the matter of reservations. Another striking phenomenon seems prima facie to lead to this conclusion: this is the wide range of reservation clauses found in normative treaties. While these treaties might seem by their very nature to warrant a different reservation regime than that applicable to other types of treaties, one might also expect to see parties use this system, if not regularly, then at least frequently. This is not the case, however.

208/ Cf. W. A. Schabas, op. cit. (footnote 118 above), pp. 42 and 64; see also the concerns expressed by the Human Rights Committee, the Committee on the Elimination of Discrimination against Women and the chairpersons of human rights treaty bodies (see above, para. 59).

209/ See, however, examples in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 7 September 1956 (article 9), the Convention against Discrimination in Education of 14 December 1960 (article 9), Protocol 6 to the European Convention on Human Rights, on abolition of the death penalty, of 28 April 1983 (article 4) or the European Convention against Torture of 26 November 1987 (article 21), all of which prohibit any reservations to their provisions.

210/ See, however, article 22 of the Paris Convention of 13 January 1993 on the prohibition of chemical weapons. The clauses prohibiting reservations seem to be more common in the field of environmental protection.; cf. the Madrid Protocol of 4 October 1991, on protection of the Antarctic environment (article 24), the New York Convention of 9 May 1992, on climate change (article 24), or the Rio Convention of 5 June 1992, on biological diversity (article 37), all of which exclude reservations.

211/ See para. 134 below.

Where reservation clauses do exist in such treaties, including human rights treaties, they are notable for their great diversity. 212/ These hints of the Vienna regime's "acceptability" are confirmed when one looks at the special treatment given to this regime in human rights treaties.

B. Adapting the "Vienna regime" to the particular characteristics of multilateral normative treaties

126. In the Special Rapporteur's view, the real legal question here is not whether or not it is appropriate to authorize reservations to multilateral normative treaties, but whether, when contracting parties remain silent on t legal regime of reservations, the rules set out in the 1969 and 1986 Conventions can be adapted to any type of treaty, including "normative" treaties, including in the field of human rights.

127. In truth, it would seem had to argue that the answer to this question must be in the affirmative. Should one do so, however, it is not because reservations are a "good" thing or a "bad" thing in general or for normative treaties or for human rights, but because the rules which are applicable to them under the Vienna conventions strike a good balance between the concerns raised by the advocates of reservations and those raised by their opponents, and provide a reasonable answer to their respective arguments on which a position need no longer be taken.

128. The general and uniform applicability of the legal regime of reservatio set out in the Vienna Conventions of 1969 and 1986 is related to the particular characteristics of this regime, which its architects sought to ma flexible and adaptable precisely so that it could be applied in all situations. In fact, the system is adapted to the special features of gener multilateral law-making treaties, including the requirements of human rights conventions.

(a) *Flexibility and adaptability of the "Vienna regime"*

129. The unique nature of the regime of reservations to treaties is due to t regime's fundamental features, which enable it to meet the specific needs of all types of treaties and related instruments. Its flexibility guarantees i adaptability.

130. The system of unanimity which was the rule, at least at the universal level, until the advisory opinion of the International Court of Justice on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 213/ was cumbersome and rigid. It was this rigidity that led to a preference for the Pan-American system, which became widespread after 1951. As the Court noted with regard to the 1948 Convention:

212/ On this question see P.-H. Imbert, op. cit. (footnote 43 above), pp. 193-196, or W. A. Schabas, "Invalid reservations to the International Covenant on Civil and Political Rights: is the United States still a party? Brooklyn Journal of International Law, 1995, p. 286.

213/ See above, footnote 46.

"Extensive participation in conventions of this type has already given rise to greater flexibility in the international practice concerning multilateral conventions. More general resort to reservations, very great allowance made for tacit assent to reservations, the existence of practices which go so far as to admit that the author of reservations which have been rejected by certain contracting parties is nevertheless to be regarded as a party to the convention in relation to those contracting parties that have accepted the reservations - all these factors are manifestations of a new need for flexibility in the operation of multilateral conventions." 214/

131. "Flexibility" - this is the key word of the new legal regime of reservations which is gradually replacing the old regime and becoming enshrined in the Vienna Conventions.

132. The first report of Sir Humphrey Waldock in 1962, which marks a departure by the International Court of Justice from the old reservation regime, contains a lengthy appeal, which is particularly eloquent and complete, in favour of a "so-called flexible system" under which, "as under the unanimity system, the essential interests of each individual State are to a very great extent safeguarded ...". 215/ The Special Rapporteur wishes to stress that the rules he is proposing - which have their origin largely in the rules set out in the Vienna Conventions - are most likely to promote the universality of treaties yet will have only a minimal effect on both the integrity of the text of the treaty and the principle of agreement. 216/

133. The principal elements that make this possible are the following:

(1) The permissibility of reservations must be considered in the light of the object and purpose of the treaty; 217/ this fundamental rule in itself makes it pointless to modify a reservation regime in terms of the object of the treaty, for the object is taken into account in the very wording of the basic rule;

(2) The freedom of the other contracting parties to agree is entirely preserved, since they can change the scope of the reservations as they choose practically without restriction, through the mechanism of acceptances and objections; 218/

214/ Ibid., Reports 1951, pp. 21-22; underlining added.

215/ Op. cit. (footnote 155 above), pp. 64-65. See the preliminary report (footnote 2 above), para. 36.

216/ Ibid., pp. 64-65.

217/ Cf. article 19, subparagraph (c), of the Vienna Conventions.

218/ Cf. article 20, paras. 3, 4 and 5, and articles. 21 and 22. See the preliminary report (footnote 2 above), para. 61.

(3) "The right to 'formulate' reservations instituted by the Vienna Conventions is in no way residual in nature: every treaty can limit this freedom and, in particular, prohibit any or certain reservations"; 219/ it can also institute its own regime for admissibility and monitoring reservations. Accordingly, the Vienna rules are simply a safety net which negotiators are free to reject or modify, particularly if they find it useful to do so because of the nature or the object of the treaty.

134. Moreover, it is not immaterial that, notwithstanding this possibility, many treaties do not contain reservation clauses, but simply refer implicitly to the regime set out in the 1969 and 1986 Conventions. "[C]e silence n'a pas du tout la même signification qu'autrefois; il n'est pas uniquement une conséquence du besoin de ne pas remettre en cause un compromis ou de l'impossibilité pour les Etats de s'entendre sur un texte commun; il correspond essentiellement au désir de la majorité d'entre eux de soumettre les réserves au 'système souple' élaboré dans le cadre des Nations Unies. Le silence du traité devient ainsi le résultat d'un choix positif." (This silence no longer means what it once did: it is not solely a consequence of the need to avoid questioning an agreement of the inability for States to agree on a joint text; it corresponds largely to the desire of most States to submit reservations to the 'flexible' system developed by the United Nations. The treaty's silence then becomes the result of a positive choice), 220/ and the residual rules thus become the ordinary law deliberately chosen by the parties. 221/

135. It is likewise not immaterial that this solution of implicit - and, occasionally, explicit 222/ - reference was used in a number of general multilateral normative treaties, in fields including human rights. This would seem to establish that the Vienna regime is suited to the particular characteristics generally attributed to treaties of this type.

(b) *The "Vienna regime" is suited to the particular characteristics of normative treaties*

136. The objections made to the "flexible" regime of Pan-American origin 223/ used in the Vienna Conventions on the Law of Treaties were synthesized forcefully and with skill by Fitzmaurice in an important article published in 1953. In it he stressed in particular the drawbacks the regime

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219/ Paul Reuter, op. cit. (footnote 43 above); see also para. 26 above and the other references cited in footnote 43.

220/ P.-H. Imbert, op. cit. (footnote 43), pp. 226-227.

221/ Cf. ibid., p. 226.

222/ See footnotes 18 and 19 above.

223/ This origin was rightly emphasized by Mr. Barboza during the debate on the preliminary report (A/CN.4/SR.2404, p. 12).

would present in the case of reservations to "normative" treaties. 224/ These arguments have been repeated numerous times since and revolve principally around three ideas: the Pan-American or "Vienna" regime 225/ is ostensibly unsuitable to this type of treaty and especially to human rights treaties because:

- It would undermine the integrity of the rules set out therein, and uniform implementation of these rules is essential for the community of contracting States;

- It would be incompatible with the absence of reciprocity in commitments undertaken by the parties under such instruments; and

- It would fail to preserve equality between the parties.

(i) Problems related to the "integrity" of normative treaties

137. It is undeniable that the "Vienna regime" does not guarantee the absolute integrity of treaties. Furthermore, the very concept of reservations is incompatible with this notion of integrity; 226/ by definition, a reservation "purports to exclude or to modify the legal effect of certain provisions of the treaty". 227/ Thus far the only way to preserve this integrity completely has been to prohibit any reservations whatsoever; this, it cannot be repeated too often, is perfectly consistent with the 1969 and 1986 Conventions. 228/

138. The fact remains that, where a treaty is silent, the rules set out in the Vienna Conventions, by not fully addressing the concerns of those who would defend the absolute integrity of normative treaties, guarantee, to all intents and purposes, that the essence of the treaty is preserved.

139. Article 19, subparagraph (c), in fact prohibits the formulation of reservations that are incompatible "with the object and purpose of the treaty", which means that in no case can the treaty be weakened by a reservation, contrary to the fears occasionally expressed by the proponents of

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224/ Op. cit. (footnote 112 above), pp. 15-22 in particular.

225/ In reality, the two regimes differ somewhat in the way they are implemented, but they are identical in spirit, and have thus received similar criticism.

226/ As the International Court of Justice noted, "[i]t does not appear, moreover, that the conception of the absolute integrity of a convention has been transformed into a rule of international law". (See advisory opinion (footnote 46 above), Reports 1951, p. 24.)

227/ Art. 2, para. 1 (d), of the 1969 and 1986 Conventions.

228/ See above, para. 133.

the restrictive school. 229/ And this can lead to the prohibition of any reservations, because it is perfectly conceivable that a treaty on a very specific topic may have a small number of provisions that form an indissoluble whole. This situation, however, is probably the exception, if only because "purely normative" treaties are themselves rare. 230/

140. This, however, is the rationale given by the representative of the International Labour Office in his statement on 1 April 1968 to the Vienna Conference in support of the traditional prohibition of any reservation to international labour conventions. 231/ According to Mr. C. Wilfred Jenks,

> "ILO practice concerning reservations is based on the principle recognized in Article 16 232/ that reservations incompatible with the object and purpose of the treaty are inadmissible. 'Reservations to international labour Conventions are incompatible with the object and purpose of these Conventions." 233/

Actually, this explanation seems somewhat artificial, and it is probably better to assume that in this specific case the prohibition of reservations is based on a practice which, most likely, assumed a customary value owing more to do with the tripartite structure of ILO than with the object and purpose of the treaty. 234/

141. The reserving State's obligation to respect them is not the only legal guarantee against the weakening of a treaty, normative or not, by means of reservations. Indeed, there can be no doubt that the provisions concerning peremptory norms of general international law (jus cogens) cannot be the

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229/ See above, para. 117.

230/ See above, para. 85.

231/ To which Mr. Razafindralambo drew attention during the debate on the preliminary report (cf. A/CN.4.SR.2042, pp. 5-6).

232/ Became art. 19 of the Convention.

233/ The text of this statement was transmitted to the Special Rapporteur by the ILO Legal Counsel.

234/ Jenks, in the same statement, added that "[t]he procedural arrangements concerning reservations embodied in the Draft Articles are entirely inapplicable to the ILO by reason of its tripartite character as an organization in which, in the language of our Constitution, 'representatives of employers and workers' enjoy 'equal status with those of governments'". See also the Report of the Director-General of the International Labour Office submitted to the International Labour Conference in 1921, International Labour Conference - Third session, vol. III, annex XVII, p. 1046, and the Memorandum by the Director-General of ILO dated 15 June 1927 (footnote 125 above), p. 882.

subject of reservations. General Comment No. 24 of the Human Rights Committee links this prohibition with the prohibition against any action contrary to the object and purpose of the treaty:

> "Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant". 235/

This wording is open to discussion 236/ and cannot, in any event, be generalized: one can well imagine a treaty referring, very indirectly, to a norm of jus cogens without that norm having anything to do with the object and purpose of the treaty. A reservation to such a provision would still be impermissible, for one cannot imagine a State using a reservation to a treaty provision, to avoid having to respect a rule which it was in any case obliged in respect as "a norm from which no derogation is permitted". 237/

142. Whatever its basis, the rule is no less definite and can have concrete effects in the area of human rights. There is no question that certain rules which seek to protect human rights are of a peremptory character; the International Court of Justice in fact provided two such examples in the commentary to draft article 50 (which became article 53 of the 1969 Convention) in its 1966 report: the prohibition of genocide and of slavery. 238/ However, this is not the case with all rules that seek to protect rights, 239/ and the identification of these norms is not easy; this is in fact the main flaw in the notion of jus cogens. Yet the principle is not really debatable: peremptory provisions in treaties cannot be the subject of reservations, and this, taken together with respect for the object and purpose of the treaty, provides a further guarantee for the integrity of normative conventions, particulary in the field of human rights.

143. Should one go further and consider that reservations to treaties which reflect the rules of customary international law are always impermissible? The Human Rights Committee affirmed this, basing itself on the special characteristics of human rights treaties:

235/ See above, footnote 86, para. 8.

236/ Cf. the doubts expressed in this connection by the United States of America in its commentary (footnote 87) to General Comment No. 24 (52).

237/ Cf. art. 53 of the 1969 and 1986 Vienna Conventions.

238/ Yearbook ... 1966, vol. II, p. 248.

239/ See, for example, M. Coccia, op. cit. (footnote 96 above), p. 17; J. McBride, op. cit. (note 118 above), pp. 1 and 32 ff; W. A. Schabas, op. cit. (footnote 118 above), pp. 49-50; however, see also the doubts raised by Éric Suy, "Droits des traités et droits de l'homme" in Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit, Menschenrechte - Festschrift für Hermann Mosler (Berlin, Springer-Verlag, 1983), pp. 935-939.

"Although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction". 240/

144. This would seem to be debatable prima facie.

145. One might, after further study, 241/ agree with the Human Rights Committee that reservations to customary norms are not excluded a priori - such norms are binding on States independently of whether they have expressed their acceptance of the treaty norm; however, unlike the case of peremptory norms, States can derogate from customary norms by agreement inter se. And one should not overlook the phenomenon of the "persistent objector", the party who can indeed refuse to apply a rule which it cannot oppose under general international law. As the United Kingdom pointed out in its observations on General Comment No. 24, "there is a clear distinction between choosing not to enter into treaty obligations and trying to opt out of customary international law". 242/ But if this reasoning is correct, it is hard to see why it would not apply also to reservations to human rights treaties.

146. By way of justification, the Human Rights Committee limits itself to noting that these instruments are designed to protect the rights of individuals. What is involved is a simple matter of principle: implicitly, the Committee starts from the assumption that human rights treaties are legislative, not only in the material sense - which, with some reservations, is acceptable 243/ - but also in the formal sense, which is not acceptable and is the product of a highly questionable amalgam.

147. In making this assumption, the Committee is forgetting that these instruments, even though they are designed to protect individuals, are still treaties: it is true that they benefit individuals directly, but only because - and after - States have expressed their willingness to be bound by them. The rights of the individual derive from the State's consent to be bound by such instruments. Reservations are inseparable from such consent, and the Special Rapporteur believes that the order of factors cannot be reversed by stating - as the Committee does - that the rule exists as a matter of principle and is binding on the State, at least by virtue of the treaty, if the State has not consented to it. If, as the Committee maintains, States can

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240/ General Comment No. 24 (footnote 86 above), para. 8. (France, in its remarks (see footnote 87 above), rightly pointed out that "paragraph 8 is worded in such a way that the document seems to associate, to the point of confusing them, two separate legal notions - that of 'peremptory norms' and that of 'rules of international customary law'".

241/ See above, para. 74.

242/ Commentary (footnote 87 above), para. 7, p. 154. (However, one may well question what real motives a State might have for doing so.)

243/ See above, para. 85.

"reserve inter se application of rules of general international law", there is no legal reason why the same should not be true of human rights treaties; in any event, the Committee does not give any such reason.

(ii) Problems with regard to the "non-reciprocity" of undertakings

148. In fact, this somewhat marginal issue of whether reservations can be made to treaty provisions reproducing rules of customary law ties in with another, broader issue, that of whether the "Vienna regime" is not incompatible with the non-reciprocity that is one of the essential characteristics of human rights treaties and, more generally, normative treaties.

149. According to a recent article, "[i]n contrast to most multilateral treaties, human rights agreements do not establish a network of bilateral legal relationships among the states parties, but rather an objective regime for the protection of values accepted by all of them. A reservation entered by one state therefore cannot have the reciprocal effect of releasing one or all the other states parties from its or their treaty obligations" 244/

150. These arguments are largely correct, but while they may perhaps lead one to think that reservations to human rights treaties should be prohibited or permitted restrictively 245/ - a decision that is solely up to the contracting parties - they do not in any way allow one to conclude that the common regime of reservations is inapplicable to such instruments.

151. These statements should first of all be qualified:

1. If they are valid, they are not valid only for human rights, and while a rigorous quantitative analysis is not possible here, one might ask whether normative treaties are not the largest category of multilateral treaties so far concluded;

2. While it is true that human rights treaties assume that the parties accept certain common values, it is still an open question whether they must necessarily accept all the values conveyed by a complex human rights treaty;

3. It must also be admitted that the concept of reciprocity is not totally absent from normative treaties, including those in the area of human rights. 246/

244/ T. Giegerich, op. cit. (footnote 200 above), English summary, p. 780; see also, inter alia: Antonio Cassese, "A new reservations clause (art. 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination", in Recueil d'études de droit international en hommage à Paul Guggenheim, (Geneva, Institut Universitaire des Hautes Etudes Internationales 1968), p. 268; B. Clark, op. cit. (footnote 205 above); R.J. Cook, op. cit. (footnote 128 above), p. 646.

245/ See above, sect. 1, para. 3, paras. 97-105.

246/ See above, para. 85.

152. It is nevertheless true that reciprocity is certainly less omnipresent in human rights treaties than in other treaties and that, as the European Commission of Human Rights has noted, the obligations resulting from such treaties "are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties". 247/ Or, in the words of the Inter-American Court of Human Rights:

> "In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations not in relation to other States, but towards all individuals within their jurisdiction." 248/

153. Secondly, however, it is highly doubtful that this specific feature of human rights treaties would make the reservations regime inapplicable as a matter of principle.

154. Of course, force of circumstance and the actual nature of the "non-reciprocal" clauses to which the reservations apply result in a situation where "the reciprocal function of the reservation mechanism is almost meaningless". 249/ "It would be simply absurd to conclude that the objections by the various European states to the United States reservations on the death penalty discharge them from their obligations under Articles 6 and 7 [of the 1966 Covenant on Civil and Political Rights] as concerns the United States, and this is surely not their intention in making the objection". 250/

155. But all that we can deduce from this is that when a State enters a reservation to a treaty provision that must apply without reciprocity, the provisions of article 21, paragraph 3, of the Vienna Conventions of 1969 and 1986 do not apply; that is all. Moreover, the same is true when it is not the provision to which the reservation applies but the reservation itself that, by its nature, does not lend itself to reciprocity. 251/ This is the case

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247/ Austria v. Italy case, decision on admissibility, 11 January 1961, Yearbook of the European Convention on Human Rights, 1961, p. 140; see also the advisory opinion (footnote 81 above), para. 30.

248/ Advisory opinion 2/82 (footnote 81 above).

249/ Rosalyn Higgins, "Human rights: Some questions of integrity", M.L.R., 1989, p. 9; see also op. cit. (footnote 99 above), pp. 13 and 14 (manuscript version).

250/ W. A. Schabas, op. cit. (footnote 118 above), p. 65. In the same vein, see G. G. Fitzmaurice, op. cit. (footnote 112 above), pp. 15 and 16, of R. Higgins, op. cit. (footnote 98 above), p. 13.

251/ See to this effect P.-H. Imbert, op. cit. (footnote 43 above), p. 258 and the somewhat diverse examples given by this author, pp. 258-260.

with reservations that are territorial in scope: it is hardly conceivable, for instance, that France might respond to a reservation by which Denmark reserved the right not to apply a treaty to Greenland by deciding not to apply that treaty to its own overseas departments. Besides, very generally speaking, the principle of reciprocity assumes a certain equality in the positions of the parties in order for a State to be able to "respond" to a reservation. 252/

156. But, unless it is by "doctrinal decree", reciprocity is not a function inherent in a reservations regime and is not in any way the object of such a regime. 253/ Integrity and universality are reconciled in a treaty by preserving its object and its purpose, independently of any consideration having to do with the reciprocity of the parties' undertakings, and it is hard to see why a reciprocity that the convention rules out would be reintroduced by means of reservations.

157. In fact, we have two choices:

- Either the provision to which the reservation applies imposes reciprocal obligations, in which case the exact balance of rights and obligations of each party is guaranteed by means of reservations, acceptances and objections, and article 21, paragraph 3, can and must be applied in full;

- Or the provision is "normative" or "objective", and States do not expect reciprocity for the undertakings they have given; there is no point then in speculating about possible violations of a "reciprocity" which is not a precondition for the parties' undertakings, and the provisions of article 20, paragraph 3, are not relevant. One simply cannot say here that the reservation is "established with regard to another party".

158. This does not mean that the reservations regime instituted by the Vienna Conventions does not apply in this second case:

- The limitations imposed by article 19 on the freedom to formulate reservations remain entirely valid;

- Under article 20, paragraph 4 (b), an objecting State is always free to refuse to allow the treaty to enter into force as between itself and the reserving State;

252/ Ibid.

253/ See above, para. 1.

Even if this is not the case, objections are not without effect. In particular, they can play a major role in the interpretation of a treaty either by any bodies which the treaty may set up 254/ or by external mechanisms for the settlement of disputes, 255/ or even by national jurisdictions.

(iii) Problems of equality between the parties

159. Many authors link so-called problems of reciprocity to the fact that the reservations regime instituted by the Vienna Conventions allegedly violates the principle of equality between the parties to normative treaties. Professor Pierre-Henri Imbert sums up this argument 256/ as follows: the absence of reciprocity means that reservations may violate another fundamental principle, that of equality between the contracting parties. States which have not entered reservations are required to comply with the entire treaty, including the provisions whose application has been evaded by the reserving State. The latter State will thus be at an advantage. This inequality cannot be counterbalanced by objections to the reservations, since the objecting State will still be required to fulfil all its obligations, even if it refuses to be bound with regard to the reserving State. 257/

160. In his first report, Sir Humphrey Waldock countered this argument, noting that:

> "Too much weight ought not, however, to be given to this point. For normally the State wishing to make a reservation would equally have the assurance that the non-reserving State would be obliged to comply with the provisions of the treaty by reason of

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254/ See P.-H. Imbert, op. cit. (footnote 117 above) and the examples cited on pp. 116 and 117 (HRR 1984, pp. 37 and 38); see also B. Clark, op. cit. (footnote 205 above), p. 318, or W. A. Schabas, op. cit. (footnote 212 above), pp. 313 and 314.

255/ In the Loizidou case (footnote 80 above), the European Court of Human Rights based itself on "the subsequent reaction of various Contracting Parties to the Turkish declarations", in view of Turkey's "awareness of the legal position" created by declarations which the Court deemed invalid (para. 95).

256/ Of which Sir Gerald Fitzmaurice was an ardent proponent (cf. op. cit. (footnote 112 above), p. 16, or "The law and procedure of the International Court of Justice, 1951-1954: treaty interpretation and other treaty points", B.Y.B.I.L., 1957, pp. 278, 282 and 287).

257/ Op. cit. (footnote 127), p. 110. The Commission showed itself sympathetic to this argument in its Report for 1951 (footnote 47 above), in which it noted that, in treaties of a law-making type:

> "each State accepts limitations on its own freedom of action on the understanding that the other participating States will accept the same limitations on a basis of equality" (para. 22).

its obligations to other States, 258/ even if the reserving State remained completely outside the treaty. By entering into the treaty subject to its reservation, the reserving State at least submits itself in some measure to the regime of the treaty. The position of the non-reserving State is not made in any respect any more onerous if the reserving State becomes a party to the treaty on a limited basis by reason of its reservation". 259/

The reservation does not create inequality, but attenuates it by enabling the author of the reservation, who without it would have remained outside the circle of contracting parties, to be partially bound by the treaty. 260/

161. Once the reservation 261/ has been made, article 19 and subsequent articles of the Vienna Conventions guarantee the equality of the contracting parties in that:

- "The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se" (article 21, paragraph 2); and

- These other parties may formulate an objection and draw whatever inferences they see fit.

However, by virtue of article 20, paragraph 4, the objecting State may restore the equality which it considers threatened by the reservation by preventing the entry into force of the treaty as between itself and the reserving State. This puts the two States in the same position as if the reserving State had not expressed its consent to be bound by the treaty.

162. Furthermore, both the argument based on the loss of equality between the parties and that based on non-reciprocity are difficult to comprehend in that it is hard to see why and how they could apply in the case of treaties which are specifically not based on reciprocity of obligations between the parties but rather constitute clusters of unilateral undertakings pursuing the same ends. It is illogical to suggest that each contracting party should consent to be bound only because the others will do likewise, since its obligations

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258/ And, one might add, by reason of the very nature of the treaty.

259/ Yearbook ... 1962, vol. II, p. 64. The Commission endorsed this reasoning (cf. its reports to the General Assembly in 1962, ibid., p. 198, and 1966, Yearbook ... 1966, vol. II, p. 224).

260/ Mr. Cassese rightly emphasizes that equality could be adversely affected by the implementation of certain "collegiate" mechanisms for monitoring the permissibility of reservations (op. cit. (footnote 244 above), pp. 301 and 302). However, this is a very different problem, involving the possible breakdown of equality between reserving States, and is in any case caused not by the "Vienna regime" (which is not collegiate) but by the waiving of that regime.

261/ Which, it will be recalled, is a unilateral statement (art. 2, para. 1 (d), of the 1969 Convention).

are not the counterpart of those assumed by the others. 262/ And it is not a little ironic that it is precisely the authors who insist most on the non-reciprocal nature of normative treaties, beginning with human rights instruments, who also invoke the adverse effects which the formulation of reservations has on reciprocity and equality: how could reservations affect the reciprocity ... of non-reciprocal undertakings?

Conclusion of section 2: The "Vienna regime" is generally applicable

163. In concluding this analysis, it appears that:

1. The reservations regime embodied in the 1969 and 1986 Conventions was conceived by its authors as being able to be, and being required to be, applied to all multilateral treaties, whatever their object, 263/ with the exception of certain treaties concluded among a limited number of parties and constituent instruments of an international organization, for which some limited exceptions were made;

2. Because of its flexibility, this regime is suited to the particular characteristics of normative treaties, including human rights instruments; 264/

3. While not ensuring their absolute integrity, which would scarcely be compatible with the actual definition of reservations, it preserves their essential content and guarantees that this is not distorted;

4. This conclusion is not contradicted by the arguments alleging violation of the principles of reciprocity and equality among the parties; if such a violation occurred, it would be caused by the reservations themselves and not by the rules applicable to them; moreover, these objections are hardly compatible with the actual nature of normative treaties, which are not based on reciprocity of the undertakings given by the parties;

262/ P.-H. Imbert, op. cit. (footnote 43 above), p. 372.

263/ To use the formula adopted by Mr. Rao in discussing the preliminary report, it achieves "a certain diversity in unity" (A/CN.4/SR.2404, p. 19).

264/ This was, moreover, the position taken by most States whose representatives spoke on this point in the Sixth Committee at the fiftieth session of the General Assembly; see, inter alia, the statements on behalf of Algeria (A/C.6/50/SR.23, para. 65), India (A/C.6/50/SR.24, para. 43) or Sri Lanka (ibid., para. 82) emphasizing the desirable unity of the reservations regime, or the United States of America (A/C.6/50/SR.13, paras. 50-53), Pakistan (A/C.6/50/SR.18, para. 62), Spain (A/C.6/50/SR.22, para. 44), France (ibid., para. 54), Israel (A/C.6/50/SR.23, para. 15), the Czech Republic (ibid., para. 46) or Lebanon (A/C.6/50/SR.25, para. 20) rejecting the idea of a special regime for human rights treaties; see also the more tentative statements by the representatives of Australia (A/C.6/50/SR.24, para. 10) and Jamaica (ibid., paras. 19 and 21).

5. There is no need to take a position on the advisability of authorizing reservations to normative provisions, including those relating to human rights: if it is felt that they must be prohibited, the parties are entirely free to exclude them or to limit them as necessary by including an express clause to this effect in the treaty, a procedure which is perfectly compatible with the purely residual rules embodied in the Vienna Conventions.

Section 3. Implementation of the general reservations regime (application of the "Vienna regime" to human rights treaties)

164. The current controversy regarding the reservations regime applicable to human rights treaties 265/ is probably based, in part at least, on a misunderstanding. Despite what may have been understood from certain ambiguous or clumsy formulas, the monitoring bodies established by the human rights instruments do not challenge the principle of the applicability to these treaties of the rules relating to reservations contained in the Vienna Conventions and, in particular, they do not deny that the permissibility of reservations must be determined, where the treaty is silent on the matter, on the basis of the fundamental criterion of the object and purpose of the treaty. The real problems lie elsewhere and relate to the existence and extent of the determining powers of these bodies in this matter.

Paragraph 1. *The fundamental criterion of the object and purpose of the treaty*

165. An examination of the practice of States and international organizations and of the bodies established to monitor the implementation of treaties, including human rights treaties, confirms that the regime for reservations established by the Vienna Conventions is not only generally applicable, but is also very widely applied. This examination shows in particular that the criterion of the object and purpose of the treaty, referred to in article 19 (c), is used principally in the case where the treaty is silent, although it is also used in those cases where there are reservation clauses.

166. Although it marked the starting point of the worldwide radical transformation of the reservation regime, 266/ the 1951 advisory opinion of the International Court of Justice was given on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* of 1948. It was, moreover, the special nature of this treaty which led the Court to distance itself from what was undeniably the dominant system at the time, 267/ namely unanimous acceptance of reservations, and to favour the more flexible system of the Pan-American Union:

265/ See paras. 56-60 above.

266/ See Karl ZEMANEK "Some Unresolved Questions in the Vienna Convention on the Law of Treaties", in Jerzy MAKARCZYK, ed. Etudes de droit international en l'honneur du Juge Manfred LACHS, Nijhoff. The Hague, 1984, p. 327.

267/ As is convincingly shown by the joint dissenting opinion quoted above (footnote 130), ICJ Reports 1951, pp. 32-42.

- the Court confined its answers strictly to the questions put to it, which related exclusively to the 1948 Convention:

> "The questions [asked by the General Assembly] [...] having a clearly defined object, the replies which the Court is called upon to give to them are necessarily and strictly limited to that Convention", 268/

- it referred expressly to the special character of this Convention:

> "The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect", 269/ and

- it stressed the "purely humanitarian and civilizing purpose" of the contracting States and the fact that they did "not have any interests of their own", 270/

- the Court concluded by stating:

> "The complete exclusion from the convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis". 271/

167. It was therefore difficulties connected with reservations to a highly "normative" human rights treaty that gave rise to the definition of the present regime. As the United Kingdom pointed out in its observations on General Comment No. 24 of the Human Rights Committee, "It was in the light precisely of those characteristics of the Genocide Convention, and in the light of the desirability of widespread adherence to it, that the Court set out its approach towards reservations". 272/

268/ Ibid. p. 20; see also the operative part, pp. 29-30. Several statements made to the Court emphasized this point; one of these was the written statement of the United States (ICJ Pleadings, pp. 33 and 42-47); this is particularly noteworthy as that country then applied the rule of unanimous consent in the exercise of its functions as depositary State (see P.-H. IMBERT, op. cit. (footnote 43), p. 61, footnote 98).

269/ Ibid. p. 22; see also p. 23.

270/ Ibid. p. 23; see para. 114 above.

271/ Ibid. p. 24.

272/ Observations (footnote 87 above), para. 4, p. 152.

168. In this regard, Jude Rosalyn HIGGINS observed that:

> "Although the Genocide Convention was indeed a 'human rights treaty', the Court was in 1951 concerned with the broad distinction between 'contract treaties' and 'normative treaties'. And the issue it was addressing was whether the old unanimity rule on reservations would prevail, and whether the contract/normative distinction was relevant to this answer. The only questions put to the Court related to the legal consequences, between ratifying States, of reservations made that had been objected to (and sometimes objected to by some States but not by others).
>
> "The Court favoured a 'flexible' answer, rather than the unanimity rule, in respect of the precise questions asked to it; and it found no difference in that regard between contract and normative treaties".

She added, however:

> "that cannot be said to determine the very different question: in a human rights treaty, in respect of which a monitoring body has been given certain functions, is it implicit in its functions and in the operation of the principles of Article 19 (3) of the Vienna Convention, that the treaty body rather than contracting States should decide whether a reservation is or is not compatible with the objects and purpose of the treaty?" 273/

169. This is, indeed, a different question, which will be examined in detail further on. 274/ With regard to the question considered here, however, it will be noted that Mrs. HIGGINS recognizes that one can infer from the 1951 opinion that the Court rejected the distinction between "contract treaties" and "normative treaties" as regards the implementation of the reservations regime and that, in its view, General Comment No. 24, in the preparation of which she played a determining role, 275/ does not reject this conclusion.

170. Quite surprisingly, moreover, the Human Rights Committee itself, in this General Comment, considers that, in the absence of any express provision on the subject in the Covenant on Civil and Political Rights, "the matter of reservations [...] is governed by international law" 276/ and goes on to make express reference to article 19, paragraph 3, of the 1969 Convention. Admittedly, it considers this as providing only "relevant guidance", 277/ but the Committee immediately adds, in a footnote:

273/ Op. cit. (footnote 98), p. 6 (typewritten version), underlining in the text.

274/ See para. 2 above and, in particular, para. 178.

275/ See CCPR/C/SR.1366, para. 53, CCPR/C/SR.1380, para. 1 or CCPR/C/SR.1382, para. 1.

276/ General Comment above (footnote 36), para. 6.

277/ Ibid.

> "Although the Vienna Convention on the Law of Treaties was concluded in 1969 and entered into force in 1980 - i.e. after the entry into force of the Covenant - its terms reflect the general international law on this matter as had already been affirmed by the International Court of Justice in The Reservations to the Genocide Convention Case of 1951", 278/

and makes use of this provision to give its view on the admissibility of reservations to the Covenant 279/ by adding:

> "Even though, unlike some other human rights treaties, the Covenant does not incorporate a specific reference to the object and purpose test, that test governs the matter of interpretation and acceptability of reservations". 280/

The Committee again applied this criterion in 1995, during the consideration of the first report of the United States of America. Applying the principles enunciated in General Comment No. 24, it noted that it believed certain reservations to the Covenant by the United States 281/ "to be incompatible with the object and purpose of the Covenant". 282/

171. This position seems to apply to all cases, including those where there are no reservation clauses. Thus, although the practice of the ILO, which results in a prohibition of reservations to the international labour conventions, is due, in fact, to other factors, that organization nevertheless justifies it on grounds based on respect for the object and purpose of those instruments. 283/ Similarly, in 1992 the persons chairing the human rights treaty bodies noted that some of the reservations lodged "would appear to give rise to serious questions as to their compatibility with the object and purpose of the treaties in question" 284/ and, even more characteristically, they recommended in 1984 that treaty bodies:

278/ Ibid. footnote 3.

279/ The question of the validity of this position cannot be dealt with in the present report.

280/ Above-mentioned General Comment (footnote 86), para. 6.

281/ In particular the reservations to article 6, para. 5, and article 7.

282/ Consideration of reports submitted by States parties under article 40 of the Covenant. Comments of the Human Rights Committee, "United States of America", CCPR/C/79/Add.50, 7 April 1995, para. 14; see also the above-mentioned Report of the Committee (footnote 87), para. 279; see also the observations made by the Chairman of the Committee, Mr. Aguilar, during the consideration of the report, CCPR/C/SR.1406, paras. 2-5.

283/ See para. 140 above.

284/ See the previous Report A/47/628 (footnote 83), para. 60; see also para. 36.

"state clearly that certain reservations to international human rights instruments are contrary to the object and purpose of those instruments and consequently incompatible with treaty law"; 285/

it should be noted that, in doing so, they addressed bodies charged with monitoring treaties that contained or did not contain reservation clauses, thus showing their belief that this criterion constitutes a principle applying generally.

172. This same position is shown by the actual wording of the reservation clauses contained in international instruments, the variety of which has already been pointed out. 286/ However, despite this diversity, the constant desire of the drafters of the treaties to promote a reservations regime based on that of article 19 of the Vienna Conventions 287/ is very striking:

- as far as the Special Rapporteur is aware, it is in the area of human rights that the only treaty clause is to be found that expressly refers to the provisions of the Convention of 23 May 1969 relating to reservations; 288/

- many human rights treaties make express reference to the object and purpose as a criterion for determining the permissibility of reservations, 289/ and

- it is clear from the travaux préparatoires of treaties which do not contain reservations clauses that this silence must be interpreted as an implicit but deliberate reference to the ordinary law regime established by the Convention of 23 May 1969.

173. Here too, the example of the 1996 Covenant on Civil and Political Rights is significant. After much tergiversation, 290/ it was decided not to

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285/ See the previous Report A/49/537 (footnote 83) para. 30.

286/ See para. 125 above.

287/ or, in the case of earlier treaties, on the Pan-American "flexible regime" adopted in the ICJ's opinion of 1951.

288/ Article 75 of the American Convention on Human Rights, footnote 48 above. In its 1983 advisory opinion on restrictions to the death penalty (footnote 81 above), the Inter-American Court of Human Rights considered that the reservations of Guatemala to paragraphs 2 and 4 of article 4 of the Pact of San José were permissible in view of their compatibility with the object and purpose of the Pact.

289/ See the examples given above (footnote 49).

290/ See P.-H. IMBERT, op. cit. (footnote 43), pp. 223-224 and Rosalyn HIGGINS, "Derogations under Human Rights Treaties", B.Y.B.I.L. 1976-1977, pp. 317-318.

include any reservations clause in this treaty, but the treaty silence on this matter must be interpreted, not as a rejection of reservations, but as reflecting the intention of the negotiators to rely on the "accepted principle of international law" that any State had the right "to make reservations to a multi-lateral treaty [...] subject to the proviso that such reservations were not incompatible with the object and purposes of the treaty". 291/

174. The Rome Convention of 1950, for its part, includes a reservations clause, but the clause make no reference to this criterion. 292/ The view that reservations to this instrument must not only fulfil the requirements of article 64, but must also be consistent with the purpose and object of the treaty seems difficult to support, according to some commentators. 293/ Nevertheless, the Commission - quite clearly - and the European Court of Human Rights - less clearly - consider reservations whose permissibility is challenged before them in the light of the fundamental criterion of the object and purpose of the treaty. 294/ This approach, which seems quite a logical one - provided it is recognized that a reservation may distort the meaning of a treaty - confirms the universality of the object and purpose criterion and would seem to imply that every treaty includes an implicit clause limiting in this way the possibility of making reservations.

291/ General Assembly, twenty-first session, Report of the Third Committee, A/6546; see also the statements by the representatives of several States quoted by P.-H. IMBERT, ibid., pp. 224 and 411-412.

292/ Article 64: "1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article; 2. Any reservation made under this Article shall contain a brief statement of the law concerned".

293/ William A. SCHABAS, commentary on article 64, in Louis-Edmond PETTITI, Emannuel DECAUX and Pierre-Henri IMBERT dirs. La Convention européene des droits de l'homme - commentaire article par article. Économica, Paris, 1994, p. 938; *contra*: J. VELU et R. ERGEG, La Convention européene des droits de l'homme, Bruylant, Brussels, 1990, pp. 159-160.

294/ See the Commission's decision in the *Chrysostomos and others v. Turkey* case above (footnote 80), para. 19, and the Court's judgement in the *Loizidou* case, above (ibid.), in which the Court bases its decision on the object and purpose of articles 25 and 46 of the Convention but appears to refer more to the rules concerning the interpretation of treaties than to those concerning reservations (cf. paras. 73 and 75). In the *Temeltasch v. Switzerland* case above (*ibid.*), the Commission considered that the provisions of the Convention on the law of treaties of 23 May 1969 enunciated essentially customary rules relating to reservations (para. 68) and based itself on the definition in article 2, 1, (d), of the Convention in determining the true nature of an interpretative declaration by the defending State (paras. 69 et seq.); see, on this point, M. COCCIA, *op. cit.* (footnote 96), pp. 14-15.

175. The objections of States to reservations to human rights treaties are frequently also expressly motivated by the incompatibility of the reservations with the object and purpose of these instruments. This is all the more true as States generally seem disinclined to express objections 295/ and, when they do so, they rarely give the reasons for their actions. 296/ It is therefore highly symptomatic that, for example, nine States parties to the Convention on the Elimination of All Forms of Discrimination against Women 297/ gave this as the reason for their objections to certain reservations, 298/ one of them 299/ referring expressly to article 19 (c) of the Vienna Convention on the law of treaties. 300/ Similarly, several objections to reservations to the Covenant on Civil and Political Rights advanced as their justification, the incompatibility of the reservations with the object and purpose of the treaty. Thus the 11 European States which filed objections to the reservations of the United States 301/ gave as justification for their position the incompatibility of some of these reservations with the object and purpose, either of the Covenant as a whole, or of some of its provisions. 302/

295/ Cf. M. COCCIA, ibid., pp. 34-35 and appendix pp. 50-51; P.-H. IMBERT, op. cit. (footnote 43), pp. 419-434 and D. SHELTON, op. cit. (footnote 207), pp. 227-228.

296/ Cf. D. BOWETT, "Reservations to non-restricted multilateral treaties", B.Y.B.I.L. 1976-77, p. 75; C. REDGEWELL op. cit. (footnote 97), p. 276 and K. ZEMANEC, op. cit. (footnote 266), p. 334; See also the views expressed by the Human Rights Committee in General Comment No. ..., above, (footnote 86), para. 17.

297/ Austria, Canada, Finland, Germany, Mexico, Netherlands, Norway, Portugal and Sweden.

298/ Including those of Bangladesh, Brazil, Egypt, India, Iraq, Jamaica, Jordan, Libyan Arab Jamahiriya, Malawi, Maldives, Mauritius, Morocco, New Zealand, Republic of Korea, Thailand and Tunisia.

299/ Portugal.

300/ Concerning these objections (and, more generally, concerning the reservations to the Convention of 18 December 1979), see B. CLARK, op. cit. (footnote 205), pp. 299-302 and R. COOK, op. cit. (footnote 128), pp. 687-707; see also: Anna JENEFSKY, "Permissibility of Egypt's Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women", Maryland Journal of International Law and Trade, pp. 199-233.

301/ See para. 170 above. These States are Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Portugal, Spain and Sweden.

302/ See W.A. SCHABAS, op. cit. (footnote 212), pp. 310-314; for other examples, see ibid., p. 289.

176. It is therefore undeniable that "there is a general agreement that the Vienna principle of 'object and purpose' is the test". 303/ With regard to this fundamental point, the central element of the "flexible system" adopted by the ICJ in 1951 and enshrined in the Vienna Conventions of 1969 and 1986, namely the special nature of human rights treaties or, more generally, of normative treaties, therefore does not affect the reservations regime.

Paragraph 2. *The machinery for monitoring implementation of the reservations regime*

177. One of the main "mysteries" of the reservations regime established by the Vienna Conventions on the Law of Treaties is clearly that of the relations which exist, might exist, or should exist, between article 19, on the one hand, and the following articles, on the other. There can be no question of attempting, within the framework of the present report, to dispel this mystery, as this would be tantamount to taking sides, prematurely, in the quarrel concerning "opposability" and "admissibility". 304/

178. It is perhaps sufficient to note that "[d]e façon générale, la plupart des problèmes posés par l'alinéa c) de l'article 19 disparaissent dans la pratique ...", 305/ and that the modalities and effects of monitoring the permissibility of reservations are problems that are, primarily, of a practical nature. It would not be correct, however, to say that these problems "disappear" when a treaty establishes machinery for monitoring its implementation. In addition to the uncertainties inherent in the "Vienna regime", there are other ones which the drafters of the 1969 and 1986 Conventions do not seem to have thought of 306/ and which are due to

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303/ R. HIGGINS, op. cit. (footnote 98), p. 9 (typewritten version).

304/ See above paras. 42-45 and Preliminary Report, above, (footnote 2), paras. 97-108 and 115-123.

305/ P.-H. IMBERT, op. cit. (footnote 43), p. 138.

306/ As Rosalyn HIGGINS wrote: "This question was simply never before the International Court in the *Reservations* case - nor at issue in the preparation of the Vienna Convention. Indeed, it could not have been. Neither in 1951 nor in 1969 did there exist a web of multilateral human rights treaties with their own treaty bodies. That phenomenon was to come later" (op. cit. footnote 98; see also *supra*, para. 168) and, similarly: D. SHELTON, op. cit. (footnote 207), p. 229. Some commentators soon revealed their perplexity on this point. See, for example, A. MARESCA: "Perplessita possono sorgere, ed interrogativi possono porsi, in particulare su *tre punti della codificata normativa*: (a) a quale soggetto, a quale organo, a quale ente competente, il potere di valutare se la formulata riserva sia *compatibile*, oppure no. con l'oggetto e con il fine del trattato? ..." (There may be some perplexity and questions may need to be answered, particularly regarding Three Aspects of the Codified Norm: (a) what subject, what body and what entities have the power of determining whether the reservation made is compatible or not with the object and purpose of the treaty? ...) (op. cit., note 43, p. 304, italics in the text).

the concurrence of systems for verifying the permissibility of reservations that may be envisaged: in accordance with the - more "imprecise" than "flexible" - rules on this point, deriving from these conventions, on the one hand, or by the monitoring mechanisms themselves, on the other? And if the answer to this question leads to these mechanisms being taken into account, a second question has immediately to be answered: what is or what should be the effect of the verification they perform?

A. Determination by the monitoring bodies of the permissibility of reservations

179. As was seen earlier, 307/ the "Vienna regime", intended to be of general application, is substantively adapted to the particular requirements of the human rights treaties and the general mechanisms for determining the permissibility of reservations can also apply to reservations made in this area. However, the last 15 years have seen the development of additional forms of control carried out directly by the human rights treaty monitoring bodies, the existence, if not the permissibility, of which can scarcely be questioned. This raises the problem of the coexistence and combination of these two types of control.

(a) *Role of the traditional mechanisms*

180. Apart from any uncertainties which may exist regarding the link between articles 19 and 20 of the Vienna Conventions, there is general agreement that the reservations regime which they establish "is based on the consensual character of treaties". 308/ This view constitutes the fundamental "*creed*" of the "opposability" school, which is based on the idea that "the validity of a reservation depends solely on the acceptance of the reservation by another contracting State". 309/ It is not rejected, however, by the supporters of "admissibility". Thus, for example, Professor BOWETT points out that where a treaty contains no provisions concerning the settlement of disputes, "there is at present no alternative to the system in which each party decides for itself whether another party's reservations are permissible". 310/

181. This conventional - and imperfect - mechanism for verifying the permissibility of reservations is employed in the case of the human rights treaties:

307/ Section 1 above.

308/ Taslim O. ELIAS. The Modern Law of Treaties, Oceana, Dobbs Ferry, 1974, p. 34. See also W.W. BISHOP, op. cit. (footnote 135), C. REDGWELL, op. cit. (footnote 97), p. 268 and Ch. TOMUSCHAT, op. cit. (footnote 134), p. 466.

309/ J.M. RUDA, op. cit. (footnote 128), p. 190. See also the Preliminary report above (footnote 2), para. 102.

310/ Op. cit. (footnote 296), p. 81.

- certain reservations clauses included in these treaties "expressly make these clauses subject to the acceptance-objection process ...", 311/

- States do not hesitate to object to reservations to such treaties made by other parties, even in the absence of any express provision in the treaties, 312/ and

- the other parties may induce the State making the reservation to withdraw the latter, 313/

- while the treaty monitoring bodies may take account of this in interpreting the treaty or determining the fate of the reservation, 314/ and

- the persons chairing the human rights treaty bodies believe: "it is essential, if the present system relating to reservations is to function adequately, that States that are already parties to a particular treaty should give full consideration to lodging an objection on each occasion when that may be appropriate". 315/

182. There is nothing, of course, to prevent the parties from adopting a different system - either collegial or jurisdictional - for determining the validity of reservations. Both of these possibilities were envisaged on various occasions during the travaux préparatoires for the 1969 Convention, but were eventually rejected. Thus, the first two of the four "alternative drafts" proposed *de lege ferenda* by LAUTERPACHT in his first Report on the law of treaties in 1953 was based on a collegial control of the validity of reservations by two thirds of the States concerned, 316/ while under the

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311/ P.-H. IMBERT, op. cit. (footnote 117), p. 122 (H.R.R. 1951, p. 40); see for example article 8 of the Convention on the Nationality of Married Women of 29 January 1957 and article 75 of the American Convention on Human Rights, above (footnote 48), which makes reference to the 1969 Convention.

312/ See para. 175, above.

313/ Australia and the Republic of Korea withdrew some of their reservations to the 1966 Covenant on Civil and Political Rights following objections lodged by other States parties (cf. Multilateral Treaties Deposited with the Secretary-General: status as at 31 December 1994, ST/LEG/SER.E/13, p. 123 and 127-130).

314/ See para. 158 above.

315/ Report above (footnote 83) of 10 November 1992, para. 64: see also para. 36 and the Report of the Committee on the Elimination of Discrimination against Women, A/48/38, mimeographed version, p. 7.

316/ Yearbook ... 1953, pp. 124-133.

two other drafts this control was entrusted to a committee appointed by the parties, 317/ or to a chamber of summary procedure of the International Court of Justice. 318/ 319/

183. Although these proposals were not incorporated in the Vienna Conventions, they were included in some of the reservations clauses inserted in multilateral treaties. Thus, in the area of human rights, article 20, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 provides as follows:

> "A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States parties to this Convention object to it." 320/

184. In cases such as these, determination of the admissibility of a reservation is entrusted, not to each State acting for itself, but to the totality of the parties as a collective body. This does not, however, modify the essence of the system: the consent of the parties is expressed (i) by adoption of the reservations clause itself (ii) collectively by the traditional system of acceptance (which may be tacit) or objection.

317/ Ibid., pp. 133-134.

318/ Ibid., pp. 134-135.

319/ See also the position taken by Hersch LAUTERPACHT in "Some Possible Solutions of the Problem of Reservations to Treaties", Transactions of the Grotius Society, vol. 39, 1964, pp. 108 et seq. Surprisingly, Sir Gerald FITZMAURICE, who considered a collegial system to be "an ideal system" (op. cit. (footnote 112) pp. 23-26), did not take up this idea in his first Report (see Yearbook ... 1956, pp. 129-130). During the deliberations in 1962 several members of the Commission supported the adoption of such a system, while others successfully opposed the idea (see A. CASSESE, op. cit. (footnote 244) p. 272); some States also submitted amendments to this effect at the Vienna Conference: see, for example, the proposals of Japan (A/CONF.39/C.1/L.133 and Summary Records above (footnote 166) pp. 199-120 and of the United Kingdom (ibid., pp. 123-124).

320/ For a detailed commentary on this provision, see A. CASSESE, ibid., pp. 266-304. Comparable clauses exist in other areas; see, for example, article 39 of the Customs Convention on the Temporary Importation of Private Road Vehicles of 4 June 1954, article 20 of the Convention of the same date concerning customs facilities for touring (and article 14 of the Additional Protocol thereto) and article 50 of the Single Convention on Narcotic Drugs of 30 March 1961. Other treaties, including treaties concluded under the auspices of FAO, incorporate the principle of the unanimous consent of the parties (see P.-H. IMBERT, op. cit. (footnote 43) pp. 174-175).

185. This second element of the consensual principle disappears if control of the admissibility of the reservation is entrusted to a jurisdictional or quasi-jurisdictional type of body.

186. As far as the Special Rapporteur is aware, there is no express reservations clause providing for this last arrangement. We may however consider that the mere fact that a treaty provides for the settlement of disputes connected with its implementation through a jurisdictional or arbitral body, automatically empowers the latter to determine the admissibility of reservations or the validity of objections. "The question of permissibility, since it is governed by the treaty itself, is eminently a legal question and entirely suitable for judicial determination and, so far as the treaty itself or some other general treaty requiring legal settlement of disputes requires the parties to submit this type of legal question to adjudication, this would be the appropriate means of resolving the question." 321/ Here too, we remain in the context of mechanisms that are well established in general international law.

187. There does exist, moreover, an arbitral and judicial practice of this nature, although it is admittedly limited.

188. In the *Mer d'Iroise* case, for example, the United Kingdom maintained before the arbitral tribunal to which the dispute was submitted, that the three French reservations to article 6 of the Continental Shelf Convention "should be left out of consideration altogether as being either inadmissible or not true reservations" 322/ In its decision of 30 June 1977, the tribunal implicitly recognized itself competent to rule on these matters and considered "that the three reservations to article 6 are true reservations and admissible". 323/

189. Similarly, in the case concerning *Right of Passage over Indian Territory*, the International Court of Justice examined, and rejected, India's first preliminary objection that "the Portuguese Declaration of acceptance of the jurisdiction of the court of 19 December 1995, is invalid for the reason that the Third Condition of the Declaration is incompatible with the object and purpose of the optional clause". 324/ Although the Court itself never

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321/ D.W. BOWETT, op. cit. (footnote 296), p. 81. Likewise: M. COCCIA op. cit. (footnote 96), p. 26. The latter considers, however, that a State which accepts a reservation is no longer entitled to take advantage of its inadmissibility.

322/ Decision of 30 June 1977 (footnote 137 above), para. 49.

323/ Ibid., para. 56; see paras. 50-55.

324/ Judgement of 26 November 1957, Reports of ICJ 1957, p. 141; see the Court's response, pp. 141-144.

declared impermissible a reservation to an optional declaration of acceptance of its compulsory jurisdiction, Sir Hersch LAUTERPACHT twice held in well-supported opinions, that the Court should have done so. 325/ 326/

190. What the Court can do in litigious cases, it can obviously also do in consultative matters. As the Court observed, the questions submitted to it in 1951 were:

> "purely abstract in character. They refer neither to the reservations, which have, in fact, been made to the Convention by certain States, nor to the objections which have been made to such reservations by other States. They do not even refer to the reservations which may in future be made in respect of any particular article; nor do they refer to the objections to which these reservations might give rise". 327/

However, there is nothing to prevent this being the case and the human rights treaty monitoring bodies would be perfectly entitled to seek an advisory opinion regarding the permissibility of reservations to these instruments, as some have, moreover, contemplated doing, 328/ and, juridically, there is nothing to prevent such a body requesting the Economic and Social Council or the General Assembly, as appropriate, "to request an advisory opinion on the issue from the International Court of Justice" in relation to reservations with the object and purpose of the treaty, nor, from a legal standpoint, is there anything to prevent the inclusion in a future human rights treaty of "a provision permitting the relevant treaty body to request an advisory opinion from the International Court of Justice in relation to any reservation that it considers might be incompatible with the object and purpose of the treaty", as was suggested by the chairpersons of the human rights treaty bodies in 1992. 329/

325/ Case of *Certain Norwegian loans*, separate opinion, ICJ Reports, 1975, pp. 43-55 and *Interhandel* case, dissenting opinion, ICJ Reports, 1959, pp. 103-106; see also the dissenting opinions of President Klaestad and of Judge ARMAND-HUGON, ibid., pp. 76 and 93.

326/ In its judgement in the *Loizidou* case, the European Court of Human Rights considered that reservations concerning its competence could not be judged according to the same criteria as those applicable to determination of the permissibility of reservations to declarations made under article 36, paragraph 2, of the Statute of the International Court of Justice (footnote 80 above, paras. 83-85). While there may be doubts regarding this distinction, it relates to the substance of the applicable law and not to the modalities of control.

327/ Advisory opinion (footnote 46 above), ICJ Reports, 1951, p. 21.

328/ See above Report of the Committee on the Elimination of Discrimination against Women (footnote 85).

329/ Report above (footnote 83), paras. 61 and 65.

191. The Inter-American Court of Human Rights could also exercise its consultative competence in this area, including the matter of problems that might arise in the interpretation or implementation of treaties other than the Pact of San José, 330/ and the same applies to the Strasbourg Court, 331/ to which it was proposed to submit, preventively, the question of the conformity of future reservations with article 64 of the Rome Convention. 332/

192. From all these standpoints, the mechanisms for verifying the permissibility of reservations to human rights treaties are entirely conventional:

(1) The ordinary law mechanism is the ordinary law inter-State system, as reflected in article 20 of the Vienna Conventions of 1969 and 1986;

(2) It is sometimes modified or corrected by specific reservation clauses calling for majority or unanimous determination of permissibility;

(3) The jurisdictional or arbitral organs having competence to settle disputes connected with the implementation of treaties have never hesitated to give their opinion, where necessary, regarding the permissibility of reservations made by the parties;

(4) a fortiori, these organs have the competence to give advisory opinions on this matter.

(b) *Role of the human rights treaty monitoring bodies*

193. To these traditional mechanisms for determining the permissibility of reservations have been added, since the early 1980s, other such mechanisms in the area of human rights, because the bodies for monitoring the implementation of treaties concluded in this area have deemed themselves to have in this regard a right and a duty of control which do not, in principle, seem likely to be challenged.

330/ See article 64, paragraph 1, of the Convention and the advisory opinion OC-1/82 of 24 September 1982, series A; see also R.J. COOK, op. cit. (footnote 128), p. 711.

331/ See the Second Protocol to the European Convention for the Protection of Human Rights, dated 6 May 1963.

332/ See the partly dissenting opinion of Judge VALTICOS attached to the judgement of the European Court of Human Rights of 25 August 1993, Chorherr v. Austria, p. 16 of the judgement.

(i) Development of the practice of the monitoring bodies

194. Initially, it is true these bodies showed themselves to be very hesitant and reserved on this point:

- In 1978, in accordance with a very firm legal opinion given to the Director of the Human Rights Division by the Office of Legal Affairs, 333/ the Committee on the Elimination of Racial Discrimination decided:

> "The Committee must take the reservations made by States parties at the time of ratification or accession into account: it has no authority to do otherwise. A decision - even a unanimous decision - by the Committee that a reservation is unacceptable could not have any legal effect." 334/

- The Legal Counsel of the United Nations took the same position regarding the powers of the Committee for the Elimination of Discrimination against Women, 335/ and, although some members of the Committee questioned the government representatives, during the consideration of the country reports, regarding the scope of the reservations made, 336/ the Committee itself always refrained from taking a position on the matter until 1987. 337/

- The Human Rights Committee, for its part, has long maintained a prudent waiting policy in this regard. During the examination of country reports some of its members expressed themselves in favour of consideration of the validity of reservations to the Covenant, while others opposed the idea, 338/ however, it is felt that

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333/ Memorandum of 5 April 1976 (see in particular para. 8, whose wording was almost fully repeated by the Committee) reproduced *in* United Nations, Juridical Yearbook, 1976, pp. 220-221. See also Note by the Secretary-General, CERD/C/R.93.

334/ Report of the Committee to the General Assembly, A/33/18, para. 374. See in this connection the observations of P.-H. IMBERT, op. cit. (footnote 117), pp. 125-126 (H.R.R. 1981, pp. 41-42) and D. SHELTON, op. cit. (footnote 207), pp. 229-230.

335/ See the Report of the Committee on its third session, A/39/45, vol. II, annex III.

336/ See the examples given in this connection by R.J. COOK, op. cit. (footnote 128, p. 708, to footnote 303).

337/ See B. CLARK, op. cit. (footnote 205), pp. 283-289.

338/ See the examples of this given by P.-H. IMBERT, op. cit. (footnote 117), pp. 127-128 and D. SHELTON, op. cit. (footnote 207), pp. 230-231.

the Committee, although prepared to "reclassify" an interpretative declaration as a reservation, if necessary, seemed not inclined to determine the permissibility of reservations. 339/

195. At the regional level, the bodies established under the European Convention for the Protection of Human Rights also adopted, for a long time, a waiting attitude and avoided taking sides in the debate between the experts on the question whether those bodies were entitled to give an opinion on the question of the permissibility of reservations to the Convention. 340/ From the outset, the Commission and the Court considered that they should interpret these reservations and give them practical meaning, 341/ but the bodies themselves refrained from going any further or even implying that they might undertake a verification of permissibility.

196. The report adopted by the Commission on 5 May 1982 in the *Temeltasch* case, 342/ constitutes a turning point in this regard. The Commission points out:

339/ See the decisions of 8 November 1989 in M.K. v. France and T.K. v. France (CCPR/C/37/D/220 and 222/1987) in which the Committee declares the complaints inadmissible on the ground that the French "declaration" relating to article 27 of the Covenant constitutes a genuine reservation; *contra*: the opinion of R. HIGGINS, appended to the decisions, who considers that the declaration is one that is not binding on the Committee, which, *a contrario*, seemed to indicate, in both cases, that the Committee lacked the competence to determine the permissibility of reservations formulated by the States parties. See, on this point: M. SCHMIDT, op. cit. (footnote 207), pp. 6-7 (typewritten version).

340/ See in particular the controversy between Professor Héribert GOLSONG (statement at the Colloque de Rome, 5-8 November 1975, Actes du quatrième colloque international sur la Convention européenne des droits de l'homme, Council of Europe, Strasbourg, 1976, pp. 269-270 and "Les réserves aux instruments internationaux pour la protection des droits de l'homme", *in* Université catholique de Louvain, Quatrième colloque du Département des Droits de l'homme, 7 December 1978, Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme, Bruylant, Brussels, 1982) and Professor Pierre-Henri IMBERT (op. cit., footnote 117, pp. 11-114).

341/ See, for example, the reports of the Committee on Applications, No. 473/59 (Annuaire C.E.D.H., vol. 2, p. 405) and 1008/61 (ibid., vol. 5, p. 87) and, in particular, the extracts referred to by P.-H. IMBERT, op. cit. (footnote 43), pp. 176-277.

342/ Application No. 9116/30, (footnote 30 above); see Gérard COHEN-JONATHAN, La Convention européenne des Droits de l'homme, Economica, Paris, 1989, pp. 36-93; Pierre-Henri IMBERT, "Les réserves à la Convention européenne des Droits de l'homme devant la Commission de Strasbourg (Affaire Temeltasch)", R.G.D.I.P., 1983, pp. 580-625 (also published in English: "Reservations to the European Convention on Human Rights Before the Strasbourg Commission: The *Temeltasch* Case", I.C.L.Q., 1984, pp. 558-595.

> "that, even if an acceptance or an objection formulated with respect to a reservation to the Convention can be seen as having any value, that does not mean that the Commission does not have competence to express an opinion regarding the conformity with the Convention of any given reservation or interpretative declaration", 343/ [provisional translation]

and, basing itself on the "special nature" of the Convention, it

> "believes that the very system of the Convention confers upon it competence to consider whether in a specific case, a reservation or interpretative declaration has or has not been made in conformity with the Convention", 344/ [provisional translation]

consequently, the Commission finds that the Swiss interpretative declaration concerning article 6, paragraph 3 (e), of the Convention constitutes a reservation 345/ and it finds, also, that the declaration is not in conformity with the provisions of article 64 of the Convention. 346/

197. As the Commission, surprisingly, did not refer this matter to the Court, it was the Committee of Ministers that, pursuant to article 32 of the Convention, approved the Commission's report on this case 347/ and it was only six years later, by its judgement in the *Belilos* case of 29 April 1988, that the Strasbourg court adopted the Commission's position of principle. 348/ In its turn, it proceeded to "reclassify" as a reservation an "interpretative declaration" of Switzerland (concerning art. 6, para. 1, of the Convention) 349/ and held that

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343/ Para. 61.

344/ Para. 65.

345/ Paras. 68 to 82.

346/ Paras. 83 to 92.

347/ Resolution DH (83) 6 of 24 March 1983 (Annuaire C.E.D.H., 1980, p. 5.

348/ Judgement (footnote 80 above); see Henri J. BOURGUIGNON, "The Belilos Case: New Light on Reservations to Multilateral Treaties", Virginia Journal of International Law, 1989, pp. 347-386; Iain CAMERON and Frank Horn, "Reservations to the European Convention on Human Rights: The Belilos Case", G.Y.B.I.L. 1990, pp. 69-129; Gérard COHEN-JONATHAN, "Les réserves à la Convention européenne des Droits de l'homme (à propos de l'arrêt Belilos du 29 avril 1988)", R.G.D.I.P. 1989, pp. 273-314; R.J. Stuart MACDONALD, "Reservations Under the European Convention on Human Rights", Revue belge de droit international, 1988, pp. 429-450 and Susan MARKS, "Reservations Unhinged: The Belilos Case Before the European Court of Human Rights", I.C.L.Q., 1990, pp. 300-.

349/ Paras. 40 to 49.

> "the declaration in litigation does not meet the two requirements of article 64 of the Convention and must therefore be treated as invalid" 350/, [Provisional translation]

after having noted that

> "the competence of the court to determine, in the light of article 64, the validity of a reservation or of an interpretative declaration, as the case may be, was not in fact challenged. It derives both from articles 45 and 49 of the Convention [...] and from article 19 and the jurisprudence of the Court (see, finally, the judgement in the Ettl and other cases of 23 April 1987, series A No. 117, p. 19, section 42)" 351/ [Provisional translation]

198. Since that time, the Commission and the European Court of Human Rights have made use of this jurisprudence on a virtually routine basis 352/ and have extended it to reservations formulated by States in respect of their own competence. Thus, in its decision of 4 March 1991 concerning the admissibility of three applications made against Turkey, 353/ the Commission considered that certain restrictions of its competence formulated by the respondant State in its declaration of acceptance of individual applications under article 25 were "not authorized by that article". 354/ [provisional translation]. More categorically, in its judgement in the *Loizidou* case of 23 March 1995, 355/ the Strasbourg Court held that "the object and the purpose of the Convention's system" 356/ precludes States from limiting the scope of their declarations under articles 25 and 46 of the Convention by means of declarations or reservations, which confirms the practice followed by the States parties:

> "Given the nature of the Convention and the ordinary meaning of articles 25 and 46 in their context and in the light of their object and their purpose, and having regard to the practice of the Contracting

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350/ Para. 60; see paras. 51 to 59.

351/ Para. 50; in para. 42 of the *Ettl* judgement, the Court made use of the reservation of Austria to article 6, paragraph 1, of the Convention and referred to its judgement in *Ringeisen* (series A No. 13, pp. 40-41, para. 98), which merely draws the consequences of this reservation, which is interpreted in a very liberal manner (in favour of the State).

352/ See the examples quoted above, footnote 80.

353/ *Chrysostomos and others*, see above (footnote 80).

354/ Para. 42.

355/ Footnote 80 above.

356/ Para. 75.

Parties, the Court concludes that the restrictions *ratione loci* attached to the declarations of Turkey relating to articles 25 and 46 are invalid". 357/ [Provisional translation]

199. As far as the Special Rapporteur is aware, the Inter-American Court of Human Rights has not as yet had to determine, in contentious proceedings, the permissibility of reservations formulated by States parties under article 75 of the Convention of 22 November 1969. It can, however, be deduced from some of its advisory opinions that, in appropriate cases, it would adopt a position similar to that of the Strasbourg Court. Thus, in its second advisory opinion concerning the *Effects of reservations on the entry into force of the Convention*, 358/ [provisional translation] it considered that the parties have a legitimate interest in opposing reservations incompatible with the purpose and object of the Convention and "are free to assert that interest through the adjudicatory and advisory machinery established by the Convention". 359/ In particular, in its third advisory opinion, given on 8 September 1983 in the *Restrictions on the death penalty* case, 360/ the San José Court held that certain reservations by Guatemala were inadmissible. 361/

200. It is in this context that the monitoring bodies established under the universal human rights instruments adopted a much more critical attitude regarding the validity of reservations, compared with the very prudent attitude they had traditionally maintained. 362/ This is particularly noteworthy in the case of the Committee on the Elimination of Discrimination against Women 363/ and, especially, the Human Rights Committee.

201. In General Comment No. 24, 364/ the Committee states:

"It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because [...] it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a State's

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357/ Para. 89; see paras. 65 to 89.

358/ See note 81 above.

359/ Para. 38.

360/ See note 81 above.

361/ See note 288 above.

362/ See para. 194 above.

363/ See para. 59 above.

364/ Footnote 86 above.

compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles,". 365/

(ii) Basis of the control exercised by the monitoring bodies

202. This ground, which is similar to that invoked by the European and inter-American regional organs, 366/ is also the one invoked by some of those writers who believe the human rights treaty monitoring bodies have competence to verify the permissibility of reservations. For example, it has been asserted that:

- the special character of these treaties excludes "the possibilities of objection or acceptance by the other contracting States which customary international law has developed since the advisory opinion of the International Court of Justice in the case of the Convention on the Prevention and Punishment of the Crime of Genocide, traces of which are to be found in articles 19 to 23 of the Vienna Convention on the Law of Treaties," 367/ [provisional translation]

- their objective character would seem to call for an objective control, 368/

- it would be impossible for the bodies they establish to perform their general monitoring functions "without establishing which obligations bind the party concerned"; 369/

- in practice, the objections system would not really function. 370/

365/ Para. 18.

366/ See paras. 196 to 199 above.

367/ H. GOLSONG, statement at the Colloque de Rome (footnote 240 above), p. 269; see also (footnote 332 above) the opinion of Judge VALTICOS attached to the judgement of the European Court of Human Rights in the *Chorherr* case, p. 15.

368/ See Th. GIEGERICH, op. cit. (footnote 200), pp. 780-781 and R. HIGGINS, op. cit. (footnote 98), p. 10 (typewritten version).

369/ W.A. SCHABAS, op. cit. (footnote 118), p. 68.

370/ See J. MCBRIDE, op. cit. (footnote 118), p. 48 (typewritten version) and R. HIGGINS, op. cit. (footnote 98), p. 13 (typewritten version).

203. These arguments have been challenged and are certainly not all of equal validity.

204. In the first place, as is made clear in the preceding section of the present report, 371/ neither the allegedly "objective" character of human rights treaties, nor the absence of reciprocity characterizing most of their substantive provisions, constitute convincing reasons for a regime departing from the ordinary law. This might at most be a ground for saying that it might be desirable for the permissibility of reservations to those instruments to be determined by an independent and technically qualified body, but that would not result in the existing machinery being vested with such competence if it was not provided for in the treaties by which the bodies were established. 372/

205. As for the claim that the acceptance and objection mechanism does not function satisfactorily, that is a matter of judgement, which, in any event, does not constitute an argument either; the fact that the existing mechanism may be questionable does not mean that the alternative system would be legally acceptable. In particular, the criticisms of the effectiveness of the "Vienna regime" are, in fact, tantamount to a challenging of the very bases of contemporary international law. As was noted by Sir Humphrey WALDOCK, speaking as expert-consultant of the Vienna Conference on the Law of Treaties:

> "It was true that, although the International Law Commission had intended to state an objective criterion, the method of application proposed in the draft articles was subjective, in that it depended on the judgement of States. *But that situation was characteristic of many spheres of international law in the absence of a judicial decision, which in any case would bind only the State concerned and that only with respect to the case decided.* 373/

This may be seen as an unfortunate situation, but it is a fundamental characteristic of international law as a whole and, as such, affects the implementation of any treaty, irrespective of its object.

206. In fact, from the standpoint of the reservations regime, the truly special nature of the 1966 Covenant on Civil and Political Rights and the European and Inter-American Conventions on human rights, as well as many instruments of more limited scope, is not that they are human rights treaties, but that they establish bodies for monitoring their implementation. Once such bodies are established, they have, in accordance with a general legal principle that is well established and recognized in general international law, the competence that is vested in them by their own powers. This is the

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371/ See, in particular, paras. 136 to 162.

372/ See the statement by the representative of Jamaica in the Sixth Committee at the fiftieth session of the General Assembly (A/C.6/50/SR.24, para. 20).

373/ United Nations Conference on the Law of Treaties, op. cit. (footnote 166), p. 137.

only genuinely convincing argument in favour of determination of the permissibility of reservations: these bodies could not perform the functions vested in them if they could not determine the exact extent of their competence vis-à-vis the States concerned, whether in examining applications by States or by individuals or periodic reports or in exercising a consultative competence.

207. The point has been made, in this connection, that these bodies function in a context that is "quite different" from that of the International Court of Justice, which "is required, in particular, to hear, in the light of the principles of international law, any legal dispute among States arising in any part of the world" and "any question of international law", whereas the monitoring bodies exercise only verification functions in connection with a normative treaty", and that, consequently, there can be no possible analogy between the competencies of these bodies and those of the Court. 374/ This is a very debatable and even harmful argument.

208. The first ground justifying the exercise by human rights treaty monitoring bodies of the power to determine the permissibility of reservations lies in the need for these bodies to check their own competence, and therefore to determine the exact extent of the commitments entered into by the State involved; and this is possible only on the basis of any reservations which that State has attached to its undertaking. As the possibility of formulating reservations is not unlimited, this necessarily implies that the reservations must be permissible. This reasoning applies to these bodies as it does to the International Court of Justice' 375/ or any other jurisdictional or quasi-jurisdictional organ which has to apply any treaty, and is based on the principle of "mutual consent" 376/ which must be respected, in particular, in the case of a dispute between States. It is pointed out in this connection that the functions of human rights treaty monitoring bodies are never limited exclusively to the consideration of applications from individuals; these bodies are all also vested with certain powers to hear complaints from other States parties 377/ and, in the circumstances, they have, undeniably, to determine the extent of their competence.

209. It is therefore not because of their undeniably special nature that human rights treaties require determination of the permissibility of reservations formulated in respect of them, by monitoring bodies, but rather because of the "ordinariness" of these bodies. Being established by treaties, they derive

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374/ European Court of Human Rights, judgement of 23 March 1995, *Loizidou*, (footnote 80 above), paras. 84-85.

375/ See para. 189 above.

376/ See para. 96 above.

377/ See article 41 of the 1966 Covenant on Civil and Political Rights, article 24 of the European Convention and article 45 of the American Convention on Human Rights; see the observations of the United Kingdom concerning General Comment No. 24, (footnote 87 above), para. 5.

their competence from those instruments and must verify the extent of that competence on the basis of the consent of the States parties and of the general rules of the law of treaties.

210. To this it may be added that, even if the validity of this conclusion were to be challenged, the now many concurring positions taken by the human rights treaty monitoring bodies have probably created a situation which it would probably be difficult to alter. Particularly since, regarding the very principle of control, the attitude of the States concerned is not such as would establish the existence of a contrary *opinio juris*:

- Switzerland, although it contemplated doing so, 378/ did not denounce the European Convention for the Protection of Human Rights following the judgements of the European Court of Human Rights in the *Belilos* and *Weber* cases,

- nor did Turkey do so following the *Loizidou* judgement;

- the Committee of Ministers of the Council of Europe approved the solution adopted by the European Commission in the *Temeltasch* case, 379/

- the Parliamentary Assembly of the Council of Europe wishes to develop the jurisprudence of the organs of the Convention in this area, 380/

- Guatemala appears to have taken the desired action following the advisory opinion given by the Inter-American Court of Human Rights in the matter of *Restrictions on the death penalty* 381/

- and, although some States reacted negatively to the Human Rights Committee's General Comment No. 24, 382/ their criticisms related more to the Committee's consequential action following its verification of the permissibility of reservations than to the actual principle of such verification. 383/

378/ See I. CAMERON and F. HORN, op. cit. (footnote 343), p. 117.

379/ See para. 197 above.

380/ See recommendation 1223 (1993) (footnote 88), para. 7.A.ii.

381/ See Christina M. CERNA, "La Cour interamericaine des Droits de l'homme - ses premières affaires", A.F.D.I. 1983, p. 312.

382/ See para. 60 above.

383/ Thus: "The United Kingdom endorses the view that the Committee must necessarily be in a position to determine the status and effects of a reservation when obliged to do so in order to be able to perform its basic functions under the Covenant" (Observations, note 87 above, para. 11). [Provisional translation]

(c) *Combination of different methods of determining the permissibility of reservations*

211. The present situation regarding verification of the permissibility of reservations to human rights treaties is therefore one in which there is concurrence, or at least coexistence, of several mechanisms for determining the permissibility of these reservations:

- one of these - which constitutes the ordinary law, is the purely inter-State one provided for in the Vienna Conventions on the Law of Treaties of 1969 and 1986. This can be adapted by special reservation clauses contained in the treaties concerned;

- where the treaty establishes a body to monitor its implementation, it is now accepted - for reasons which are not all improper - that that body can also give its view on the permissibility of reservations;

- but this still leaves the possibility for the States parties to have recourse, where appropriate, to the customary methods of peaceful settlements of disputes, including jurisdictional or arbitral methods, in the event of a dispute arising among them concerning the permissibility of a reservation; 384/

- it may well be, moreover, that national courts, like those in Switzerland, 385/ also consider themselves entitled to determine the validity of a reservation in the light of international law.

212. The number of these various possibilities of verifying permissibility presents certain disadvantages, not least of which is the risk of conflict between the positions different parties might take on the same reservation (or on two identical reservations of different States. 386/ However, this

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384/ Subject, however, to the existence of "self-contained regimes". These certainly include those established by the European and Inter-American Conventions on Human Rights (see Bruno SIMMA, "Self-Contained Regimes", Netherlands Yearbook of International Law, 1985, pp. 130 et seq. and Theodor MERON, Human Rights and Humanitarian Norms as Customary Law, Clarendon Press, Oxford, 1989, pp. 230 et seq.).

385/ See the decision of the Federal Tribunal of 17 December 1992, *Elisabeth B. c. Conseil d'Etat du canton de Thurgovie* EuGRZ 1993, p. 17; see, more generally, the very well-informed article by Jean-François FLAUSS, "Le contentieux de la validité des réserves à la CEDH devant le Tribunal fédéral suisse: Requiem pour la déclaration interprétative relative à l'article 6 § 1", R.U.D.H. 1993, pp. 297-303.

386/ See, in particular, P.-H. IMBERT, op. cit. (footnote 342), pp. 617-619 (I.C.L.Q. 1984, pp. 590-591); the writer draws attention to the risks of incompatibility within the European Convention system, in particular between the position of the Court and the position of the Committee of Ministers.

risk is in fact inherent in any verification system - over time, any given body may take conflicting decisions - and it is perhaps better to have too much verification than no verification at all.

213. A more serious danger is that constituted by the succession of verifications over time, in the absence of any limitation of the duration of the period during which the verifications may be carried out. The problem does not arise in the case of the "Vienna regime" because article 20, paragraph 5, of the 1969 and 1986 Conventions sets a time-limit of 12 months following the date of receipt of notification of the reservation (or expression by the objecting State of its consent to be bound by the Treaty, 387/) on the period during which a State may formulate an objection. A real problem arises, however, in all cases of jurisdictional or quasi-jurisdictional control, which must be assumed to be aleatory and to depend on reference of the question to the monitoring or settlement body. In order to overcome this problem, it has been proposed that the right of the monitoring bodies to give their opinion should also be limited to a twelve-month period. 388/ Apart from the fact that none of the relevant texts currently in force provides for such a limitation, the limitation seems scarcely compatible with the very basis for action by monitoring bodies, which is designed to ensure respect for the general principles of international law (preservation of the purpose and object of the treaty). Furthermore, as has been pointed out, one of the reasons why States lodge few objections is precisely that the twelve-months rule often allows them insufficient time; 389/ the same problem is liable to arise a fortiori in the case of the monitoring bodies, as a result of which the latter may find themselves paralysed.

214. It seems, moreover, that the possibilities of cross-verifications in fact strengthen the opportunity for the reservations regime to play its real role. The problem is not one of setting one up against the other or, in the case of a single system, of seeking to affirm its monopoly over the others, 390/

387/ It should be noted, however, that a problem nevertheless arises owing to the spreading over time of ratifications and accessions.

388/ See P.-H. IMBERT, op. cit. (footnote 43), p. 146, footnote 25, (footnote 117), pp. 113-114 and 130-131 (H.R.R. 1981, pp. 36 and 44); *contra*: H. GOLSONG, Report above, (footnote 240), para. 7 and Richard W. EDWARDS Jr., "Reservations to Treaties", Michigan Journal of International Law 1989, pp. 387-388.

389/ See B. CLARK, op. cit. (footnote 206), pp. 312-314.

390/ This is in fact their natural tendency; see the conflict between the points of view of the Human Rights Committee "it is an inappropriate task for States parties in relation to human rights treaties" General Comment No. 24, (para. 18) (see above, para. 201) and France ("it is the responsibility [of the States parties] and of them alone, unless the treaty provides otherwise, to decide in the case of incompatibility between a reservation and the object and purpose of the treaty" [provisional translation] - see observations (footnote 87 above), para. 7).

but of combining them so as to strengthen their overall effectiveness, for while their modalities differ, their end purpose is the same: the aim is always to reconcile the two conflicting but fundamental requirements of integrity of the Treaty and universality of participation. 391/ It is only natural that the States, which wished to conclude the Treaty, should be able to express their point of view; it is also natural that the monitoring bodies should play fully the role of guardians of the Treaty entrusted to them by the parties.

215. This does not exclude - in fact it implies - a degree of complementarity among the different control methods, as well as cooperation among the bodies responsible for control. In particular, it is essential that, in determining the permissibility of a reservation, the monitoring bodies (as well as the organs for the settlement of disputes) should take fully into account the positions taken by contracting parties through acceptances and objections. Conversely, the States, which are required to abide by the decisions taken by the monitoring bodies, when they have given those bodies a power of decision, should pay serious attention to the well-thought-out and reasoned positions of those bodies, even though they may not be able to take legally binding decisions. 392/

391/ See above, paras. 90-98.

392/ See, however, the extremely strong reaction to General Comment No. 24 reflected by the Bill submitted in the United States Senate by Senator Helms on 9 June 1995, which provided that "No funds authorized to be appropriated by this Act nor any other Act, or otherwise made available may be obligated or expended for the conduct of any activity which has the purpose of effect of:

> "(A) reporting to the Human Rights Committee in accordance with Article 40 of the International Covenant on Civil and Political Rights, or
>
> "(B) responding to any effort by the Human Rights Committee to use the procedures of Articles 41 and 42 of the International Covenant on Civil and Political Rights to resolve claims by other parties to the Covenant that the United States is not fulfilling its obligations under the Covenant, until the President has submitted to the Congress the certification described in paragraph (2).
>
> "(2) CERTIFICATION. The certification referred to in paragraph (1) is a certification by the President to the Congress that the Human Rights Committee established under the International Covenant on Civil and Political Rights has:
>
> "(A) revoked its General Comment No. 24 adopted on 2 November 1994; and
>
> "(B) expressly recognized the validity as a matter of international law of the reservations, understandings, and declarations contained in the United States instrument of ratification of the International Covenant on Civil and Political Rights". (A Bill to

B. Consequences of the findings of monitoring bodies

216. This raises, very directly, the question of the consequences of a finding of impermissibility of a reservation by a human rights treaty monitoring body.

217. Once it is recognized that such a body can determine whether a reservation meets the permissibility requirements of ordinary law (compatibility with the object and purpose of the treaty) or of a special reservations clause, "it remains to be determined what [the body] is empowered to do should it consider that a particular reservation does not meet this requirement", a "particularly important and delicate" question, [provisional translations] as Mrs. HIGGINS pointed out during the preparation of General Comment No. 24, 393/ and one which in fact gave rise to a very lively debate. To this question must be added another, which is closely linked to it, but which it seems preferable to deal with separately for reasons of clarity. This is the question of the obligations (and the rights) of the State whose reservation has been considered inadmissible.

(a) *Rights and duties of the monitoring body*

218. The problem of the action to be taken by the monitoring body if it finds that a reservation is impermissible is generally stated in terms of "divisibility", 394/ in the sense that commentators and the monitoring bodies themselves wonder whether the reservation can be separated from the consent to be bound and whether the State making the reservation can and should be regarded as being bound by the treaty as a whole despite the impermissibility of the reservation it has formulated.

219. All the monitoring bodies which have asked themselves this question have so far answered in the affirmative:

- In the *Belilos* case, the European Court of Human Rights, indicating the grounds for its judgement, stated, laconically:

> "There is no doubt that Switzerland considers itself bound by the Convention, independently of the validity of the Declaration". 395/ [provisional translation]

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authorize appropriations for the Department of State for fiscal years 1996 through 1999 ..., 104th Congress, 1st session, S. 908-Report No. 104-95, pp. 87-88).

393/ CCPR/C/SR.1366, para. 54.

394/ Cf. R.W. EDWARDS Jr., op. cit. (footnote 388), p. 376.

395/ Judgement (note 80 above), para. 60.

- The court was more explicit in the *Loizidou* case, in which, after recalling its judgement of 1988, 396/ it dismisses the "statements made by Turkey during the course of the proceedings" but

> "notes that the respondent Government cannot fail to have been conscious, having regard to the uniform practice of the contracting parties in relation to articles 25 and 46, consisting in accepting unconditionally the competence of the Commission and of the Court, of the fact that the denounced restrictive clauses had an undeniable validity under the system of the Convention and that the Convention bodies might hold them to be inadmissible. [...]
>
> "The subsequent reaction of several contracting Parties to the Turkish statements [...] gives full support to the previous comment to the effect that Turkey was not unaware of the legal situation. [...], that being the case, the responding Government cannot invoke the ex post facto statements of the Turkish representatives in order to retreat from the basic intention - despite some compromises - to accept the competence of the Commission and of the Court.
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> "The Court therefore has, in the exercise of the responsibilities entrusted to it by article 19, to deal with this question by reference to the text of the respective declarations, in the light of the special character of the Convention regime. The latter, however, militates in favour of separation of the clauses attacked, because this is the means of guaranteeing the rights and freedoms enunciated by the Convention in all areas under Turkey's 'jurisdiction' within the meaning of article 1 of the Convention.
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> "The Court examined the text of the declarations and the wording of the restrictions in order to determine whether the restrictions that have been challenged could be dissociated from the instruments of acceptance, or whether they formed an integral and indivisible part of them. Even taking the texts of the declarations relating to articles 25 and 46 as a whole, it considers that the restrictions that have been challenged cannot be dissociated from the remainder of the text, leaving intact the acceptance of the optional clauses." 397/ [provisional translation]

396/ Judgement (footnote 80 above), para. 94.

397/ Ibid., paras. 95-97.

- And the Human Rights Committee stated that:

> "The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation." 398/

220. Although the European Court of Human Rights emphasizes the differences between the context in which it operates and that in which the International Court of Justice functions, 399/ the similarities between this reasoning and that of Sir Hersch LAUTERPACHT in his separate opinion attached to the judgement of the International Court of Justice in the *Norwegian loans* case 400/ are very striking, although the Strasbourg Court is more circumspect than the judge of the Hague Court in making use of it and, above all, the Court totally ignores the starting-point of all his reasoning, which was based on a clear alternative:

> "If the clause of the Acceptance reserving to the declaring Government the right of unilateral determination is invalid, then there are only two alternatives open to the Court: it may either treat as invalid that particular part of the reservation or it may consider the entire Acceptance to be tainted with invalidity. (There is a third possibility - *which has only to be mentioned in order to be dismissed* - namely, that the clause in question invalidates not the Acceptance as a whole but the particular reservation. This would mean that the entire reservation of matters of national jurisdiction would be treated as invalid while the Declaration of Acceptance as such would be treated as fully in force)." 401/

221. It is precisely this "third possibility" (which LAUTERPACHT mentions only immediately to reject it) that the Strasbourg Court utilizes in the judgements cited above and that the Human Rights Committee contemplates in General Comment No. 24.

222. These positions are perhaps due to the confusion of two very different concepts:

- First of all there is the concept of "severability" of the provisions of the treaty itself, 402/ which, in relation to reservations, raises the question whether the provision in respect of which the reservation is made can be separated from the treaty

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398/ General Comment No. 24 (footnote 86 above), para. 18.

399/ See above footnote 326.

400/ See footnote 325 above, ICJ Reports 1957, pp. 56-59.

401/ Ibid., pp. 55-56; italics added.

402/ See P. REUTER, op. cit. (footnote 43), p. 33.

without compromising the latter's object and purpose. This may probably be deemed a prerequisite for permissibility of the reservation, since otherwise the provisions of article 20, paragraph 4, and of article 21, paragraph 1, of the Vienna Conventions would be meaningless; 403/

- then there is the concept of the "severability" of the reservation from the consent of the State making the reservation to be generally bound by the treaty, which is something quite different 404/ and raises the question whether the reservation was or was not a prerequisite for the State's commitment.

223. It is by no means impossible to foresee what might be the consequences of the "severability" of the provision in respect of which the reservation was made that is held to be unlawful. In its observations on General Comment No. 24 of the Human Rights Committee, the United Kingdom, supporting LAUTERPACHAT's argument, 405/

> "agrees that severability 406/ of a kind may well offer a solution in appropriate cases, although its contours are only beginning to be explored in State practice. However, the United Kingdom is absolutely clear that severability would entail excising both the reservation and the parts of the treaty to which it applies. Any other solution they would find deeply contrary to principle, notably the fundamental rule reflected in Article 38 (1) of the Statute of the International Court of Justice, that international conventions establish rules 'expressly recognized by' the Contracting States". 407/

224. The "severability" practised by the European Court of Human Rights and contemplated by the Human Rights Committee leads precisely to this other solution. 408/

403/ It is in accordance with this first meaning that the most authoritative commentators on the question of reservations refer to "divisibility" (see, for example P. REUTER, ibid., pp. 76-77; D.W. BOWETT, op. cit. (footnote 296), p. 89 and Sir Ian SINCLAIR, op. cit. (footnote 207), p. 68).

404/ This appears to have been confused with the preceding concept by the European Court of Human Rights in the *Loizidou* case (see para. 219 above).

405/ See para. 220 above.

406/

407/ Observations (footnote 87 above), para. 14, underlining in the text; this possibility is likely to occur only rarely in practice.

408/ See para. 219 above.

225. During the discussion of General Comment No. 24 in the Human Rights Committee, Mrs. HIGGINS explained that "in the case of the human rights treaties, it is undesirable to exclude States parties; it is preferable, on the contrary, to keep them; hence the formulation employed in the penultimate sentence of paragraph 20". 409/ 410/ [provisional translation] As far as the Special Rapporteur is aware, this is the only explanation of "severability" to be found in the travaux préparatoires for General Comment No. 24, and it is also the principal justification given by the commentators who expressed support for it. 411/

226. This explanation presents very serious legal difficulties. In law, it is not a question of determining whether or not reserving States parties should be "kept", but whether or not they have consented to be bound and, to paraphrase the Committee, it is the States themselves - and not external bodies, however well-intentioned and technically above criticism they may be - who are "particularly well placed to perform this task"; 412/ moreover it is difficult to see how such external bodies could replace the States in carrying out the determination. The opposite solution could give rise to serious political and constitutional difficulties for the reserving State, particularly where the Parliament has attached conditions to the authorization to ratify or accede. 413/

227. It would seem odd, moreover, for the monitoring bodies to be able to go further than the States themselves can do in their relations *inter se*. Under the Vienna Conventions and in accordance with practice, only two possibilities are open to them: exclusion of application of the provision that is the subject of the reservation (art. 21, para. 1 (a)) or of the treaty as a whole (art. 20, para. 4 (b)); but the Conventions do not even contemplate "the possibility that the full treaty might come into force for the reserving State". 414/

228. However, the most serious criticism one might level at "severability" is that it takes no account whatsoever of the consensuality that is the very essence of any treaty commitment. The three States which have so far reacted to General Comment No. 24 are in agreement on this point. Their view was

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409/ Later para. 18.

410/ CCPR/C/SR.1382, para. 11.

411/ See Th. GIEGERICH, op. cit. (footnote 200), p. 782 (surprisingly, however, this commentator adds that this solution "also prevents legal uncertainty as to the status of the reserving State as a contracting party").

412/ See General Comment No. 24 (footnote 86 above), para. 18.

413/ See, in this connection, the statement by the United States representative in the Sixth Committee at the fiftieth session of the General Assembly, A/C.6/50/SR.13, para. 53.

414/ Observations of the United States (footnote 89 above), sect. 5, p. 134.

expressed particularly clearly by France, which stated that "agreements, whatever their nature, are governed by the law of treaties; they are based on the consent of States and the reservations are the conditions which the States attached to their consent. Necessarily, therefore, if the reservations are deemed incompatible with the purpose and object of the treaty, the only consequence that may be drawn from this is to state that the consent is not valid and to decide that the States are considered not to be parties to the instrument concerned". 415/ [provisional translation]

229. Subject to the possible consequences of the "severability" of the provision that is the subject of the reservation, 416/ this conclusion seems to be the correct one. Irrespective of its object, a treaty remains a juridical act based on the will of States, whose meaning cannot be presumed or invented. Human rights treaties do not escape the general law: their object and purpose do not effect any "transubstantiation" and do not transform them into international "legislation" which would bind States against their will.

230. This is the risk monitoring bodies take if they venture to determine what was the intention of a State when it bound itself by a treaty, while it was, at the same time, formulating a reservation. Not only may the determination of this intention prove extremely delicate, 417/ and not only are the precedents constituted by the *Belilos* and *Loizidou* cases very unconvincing in this regard, 418/ but the very principle of such determination gives rise to serious objections.

(b) *Rights and duties of the reserving State*

231. If the points made above are considered accepted,

1. The human rights treaty-monitoring bodies may determine the permissibility of reservations formulated by States in the light of the applicable reservations regime;

415/ Comments (footnote 87 above), sect. 7. See also above (ibid.) observations of the United States, sect. 5, and of the United Kingdom, para. 14.

416/ See above, para. 223.

417/ See the opinion (footnote 325 above) of Sir Hersch LAUTERPACHT in the *Interhandel* case, Reports 1959, pp. 112-116; see also R.W. EDWARDS Jr., op. cit. (footnote 388), p. 375.

418/ In the *Belilos* case, the European Court of Human Rights very clearly underestimated the importance of the reservation in the eyes of the Swiss authorities, as is shown by Switzerland's reluctance to remain a party to the Convention following the handing down of the judgement (see footnote 378 above). Furthermore, the entirely contrary grounds given by the Strasbourg Court in support of its decision in the *Loizidou* case reflect an offhand attitude, to say the least, on the part of the Court, towards a sovereign State, in simply casting doubt on formal statements made before it in the written proceedings (see para. 219).

2. If they consider the reservation to be impermissible, they can only conclude that the reserving State is not currently bound; 419/

3. But they cannot take the place of the reserving State in order to determine whether the latter wishes or does not wish to be bound by the treaty despite the impermissibility of the reservation accompanying the expression of its consent to be bound by the treaty.

232. The attitude of the reserving State is therefore crucial and the question is whether that State is bound by legal rules or enjoys a purely discretionary competence.

233. Here again, it is convenient to divide the problem into two questions that are separate even though linked:

- Are the findings of the monitoring body binding on the reserving State?

- Irrespective of the answer to the preceding question, has the State a choice between several types of reaction?

(i) Binding force of the findings of the monitoring body

234. Although it seems controversial, 420/ the answer to this first question does not present any problem. Indeed, it seems almost obvious that the authority of the findings made by the monitoring body on the question of reservations will depend on the powers with which the body is invested: they will have the force of *res judicata* where the body is jurisdictional in character, or is arbitral and adjudicates and will have the status of advisory opinions or recommendations in other cases.

235. Admittedly, things are somewhat more complex in practice. On the one hand, it is not always easy to determine the exact nature of the body required to make a determination, especially as one and the same body may successively exercise different competences. Furthermore, the latter do not necessarily fall into well-defined categories that are clearly identified in law. Finally, the exact scope of certain instruments is the subject of doctrinal controversy and, even where this is not the case, practical problems may also arise. 421/ Real as they are, these problems are not specific to the area of reservations. It is therefore sufficient to rely on the very general directive set out above. 422/

419/ Except in the case of "severability", which is difficult to conceive in practice (see paras. 220 to 223 above).

420/ See paras. 236 et seq.

421/ See, for example, para. 241 above.

422/ Para. 234.

236. It should be noted, however, that, even on this point, the Human Rights Committee's General Comment No. 24 has not escaped criticism. In particular, the United Kingdom criticized it for having used "the verb 'determine' in connection with the Committee's functions towards the status of reservations" and of having done so, moreover, "in the context of its dictum that the task in question is inappropriate for the States parties". 423/

237. Although the Committee meant by this that it had to take decisions that were binding on the States parties, this objection is very probably well-founded: the "comments", "reports" and "finding" adopted by the Committee under articles 40 and 41 of the Covenant or article 5 of the first Protocol are certainly not legally binding. 424/ "Findings" would have been more accurate, but it is certainly true that "too much is not to be read into the verb 'determine'": 425/ the Committee can take a position regarding the permissibility or impermissibility of reservations formulated by the States parties to the Covenant in the exercise of its general functions of monitoring the implementation of that instrument, but "a competence to do something" should not be confused with "the binding effect of that which is done". 426/

238. Furthermore, when it considered the first report of the United States of America, following the adoption of General Comment No. 24, the Committee confined itself to "regretting" the extent of the State party's reservations, declarations and understandings to the Covenant, stating that it was "also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant". 427/ Furthermore, at the last meeting devoted to consideration of this report, the Chairman of the Committee, responding to the concerns expressed by the Unite' States of America, pointed out that:

> "The Committee's interpretations as set out in its general comments were not strictly binding, although it hoped that the comments carried a certain weight and authority." 428/

423/ Observations (footnote 87 above), para. 11.

424/ "The legally binding nature of any 'determination' of the Committee, whether on the issue or otherwise, is problematic" (R. HIGGINS, op. cit. (footnote 98), p. 5, footnote 7 (typewritten version).

425/ Ibid.

426/ Ibid., p. 10 (typewritten version).

427/ Comments (footnote 282 above), para. 14.

428/ CCPR/C/SR.1406, para. 3.

239. The formulas used by the chairpersons of the bodies set up under international human rights instruments in their 1992 and 1994 reports 429/ call for similar comments. They are of different types and in any event cannot imply that the bodies concerned have greater powers in this area than those conferred on them by their statutes.

240. These powers also vary greatly, depending on circumstances and from body to body. It is nevertheless clear that by ratifying the treaties which establish these bodies, the States parties undertake to execute them in good faith, which implies at least that they will examine in good faith the comments and recommendations made to them by bodies concerned. 430/

(ii) The reactions expected from the reserving State

241. The juridical value of the findings of the monitoring bodies naturally has some bearing on the nature and scope of the consequential obligations for a reserving State whose reservation is declared inadmissible. Where the body concerned is vested with decision-making powers, the State must conform to the body's decisions. However, this rule is tempered by two factors:

- in the first place, it is not entirely obvious, from the strictly legal standpoint, that a State would be legally bound to withdraw a reservation declared impermissible if this question does not constitute the actual subject of the decision; in the case of the human rights treaty-monitoring bodies this is likely to occur only rarely, 431/

429/ "The treaty bodies should systematically review reservations made when considering a report and include in the list of questions to be addressed to reporting Governments a question as to whether a given reservation was still necessary and whether a State party would consider withdrawing a reservation that might be considered by the treaty body concerned as being incompatible with the object and purpose of the treaty. (Report above, A/47/628, footnote 83, para. 36); "They recommend that treaty bodies state clearly that certain reservations to international human rights instruments are contrary to the object and purpose of those instruments and consequently incompatible with treaty law." (Report above, A/49/537, footnote 83, para. 30).

430/ See R. HIGGINS, op. cit. (footnote 98), p. 5, footnote 11 (typewritten version); and, more generally, P. DAILLIER and A. PELLET, op. cit. (footnote 128), p. 372.

431/ This might, however, be the case if a State (the reserving State or the objecting State) were to submit to the European Court of Human Rights a dispute relating to reservations under article 46 of the European Convention on Human Rights or article 62 of the American Convention. On the other hand, it is generally considered that the principle of *res judicata* extends only to the substantive provisions of jurisdictional or arbitral decisions and to the grounds on which they are necessarily based, but not to those decisions as a whole. While a jurisdictional organ may give its views on the permissibility of a reservation when an individual or inter-State application is made

- secondly, and again from a strictly legal standpoint, assuming that such a decision were handed down, it would have the relative authority of *res judicata* and would therefore impose an obligation on the defending State only in relation to the applicant or applicants. 432/

242. Too much importance should not, however, be attached to these strictly technical considerations: it is scarcely conceivable that a State anxious to observe the law - and to preserve its international image - would adopt such a restrictive position. This applies at least to any findings that might be made in such circumstances and to the recommendations made or advisory opinions given. While such instruments have no binding force, they do grant permission 433/ and States parties cannot, without breaching the principle of good faith, remain indifferent to findings regarding the scope of their commitments, made, in the exercise of its functions (contentious, consultative or other), by an organ established under a treaty by which they have wished to be bound.

243. In all cases where such a body has found a reservation to be impermissible, the State therefore finds itself confronted with a choice. Except in special cases, it alone must determine whether the impermissible reservation that it attached to the expression of its consent to be bound constituted an essential element of that consent. 434/

244. The State has two options:

- simply to withdraw the reservation, or

- to terminate its participation in the treaty.

245. In both these cases, it must be borne in mind that the State's decision produces its effects, or in any event certain effects, *ab initio*. By definition, if the reservation is incompatible with the object and purpose of the treaty, 435/ it alters the latter's nature, emptying it of its

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to it in relation to the implementation of the Convention, it is doubtful that observations made in connection with the matter can be considered *res judicata*.

432/ See para. 205 above, the position of Sir Humphrey WALDOCK.

433/ See, for example: Jean-Paul Jacqué. Eléments pour une théorie de l'acte juridique en droit international public, L.G.D.J., Paris, 1975, p. 238 and P. DAILLIER and A. PELLET. op. cit. (footnote 128), pp. 373-374.

434/ See above, paras. 223 to 231.

435/ D.W. BOWETT makes a distinction between a reservation that is "fundamentally inconsistent with the object and purpose of the treaty" and a reservation that is simply "inadmissible" (op. cit., footnote 296, p. 77) and draws the conclusion that only the former is "a nullity and if severable can be struck out" (ibid., p. 84). *Contra:* C. REDGWELL, op. cit. (footnote 97), pp. 267-268.

substance, so that it is difficult to consider that the reserving State was really a party to the treaty. 436/ Consequently, we cannot regard as too absolute the nullity which would result from incompatibility of the reservation with the object and purpose of the Treaty; the finding of impermissibility of the reservation may be made a long time after expression by the State of its consent to be bound 437/ and may, in the meantime, have produced affects in law which it may be difficult or impossible to alter.

246. Certainly, the decision of the reserving State to end its relationships under the Treaty following a finding that its reservation is impermissible presents real drawbacks. In particular, as was noted by Judge MACDONALD, "to exclude the application of an obligation by reason of an invalid reservation is in effect to give full force and effect to the reservation". 438/ [provisional translation] This statement calls for two comments, however:

1. the Judge assumes here the case of "severability"; 439/ but what is envisaged here is different: in this case the State renounces the benefits of the Treaty as a whole (or withdraws the challenged reservation);

2. consequently, a decision of the reserving State to terminate its relationships under the Treaty simply has the effect of restoring the *statu quo ante*.

247. Yet if we relate this "all or nothing" situation to the functions of the reservations regime, 440/ it is unsatisfactory and is liable to compromise the objective of universality by encouraging the reserving State to leave the Treaty circle. The question therefore is whether this State cannot move towards an intermediate solution that will preserve the integrity of the Treaty and yet allow the State to continue its participation without this causing it insuperable difficulties. In other words, is it conceivable, from a legal standpoint, for the State concerned to modify its reservation in order to make it compatible with the object and purpose of the Treaty? 441/

436/ Notwithstanding the point made in the preceding note, the situation may be different if a reservation is prohibited by the treaty - because of a reservations clause - but yet cannot be regarded as contrary to the object and purpose of the Treaty.

437/

438/ Op. cit. (footnote 348), p. 449.

439/ See para. 222 above.

440/ See paras. 90-98 above.

441/ Or could it rectify whatever was the cause of the impermissibility of its reservation?

248. Prima facie, such an intermediate solution seems scarcely compatible with the "Vienna regime", since, under the provisions of article 19 of the 1969 and 1986 Conventions, the formulation of a reservation can take place only "when signing, ratifying, accepting, approving or acceding to a treaty". Furthermore, the possibility of raising an objection to a reservation is restricted by the time-limit set in article 20, paragraph 5.

249. However, the objection does not appear to be diriment. In the first place, if we consider that the State has never in fact expressed a valid consent to be bound by the Treaty, 442/ the "regularization" of its reservation would seem, in fact, to be concomitant with the expression of its consent to be bound. Secondly, and above all, if, as seems inevitable without serious prejudice to the fundamental principle of consent which underlies every treaty commitment, 443/ the reserving State can give up its participation in the Treaty, it is difficult to see why it could not equally well modify the sense of its reservation, so as to make it compatible with the object and purpose of the Treaty, and thus permissible. This solution, which is not incompatible with the Vienna rules, has the advantage of reconciling the requirements of integrity and universality that are inherent in any reservations regime.

250. As Judge VALTICOS wrote in the partly dissenting opinion which he appended to the *Chorherr* judgement of the European Court of Human Rights, rejection of this possibility

> "would be unreasonable, the Government concerned having been informed of the non-validity of its reservation only several years after the ratification. The Government concerned should therefore have the possibility of rectifying the situation and formulating a valid reservation within a reasonable period on the basis of its earlier reservation." 444/ [provisional translation]

251. There is, moreover, at least one precedent for such action. Although, by the *Belilos* judgement, the European Court of Human Rights considered that Switzerland was bound "irrespective of the validity of the declaration", which it had found not in conformity with article 64 of the Convention, 445/ that country, in accordance, moreover, with a suggestion it had made to the

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442/ See para. 245 above.

443/ See para. 228 above.

444/ Opinion (footnote 332 above) pp. 16-17. Judge VALTICOS further suggests that any new declaration or reservation should be submitted to the European Court of Human Rights for the latter to determine its validity. There is nothing to prevent this *de lege ferenda*, but a text should expressly provide for this, or, alternatively, it would simply be possible to follow the advisory opinion procedure of the Second Protocol.

445/ See para. 219 above.

Court and which the latter had not adopted, 446/ formulated a new declaration, 447/ without, seemingly, giving rise to any objection or protest. More generally, moreover, it probably must be recognized that States, which can at any time withdraw their reservations, may also "tone them down"; here again, the recent practice of the Secretary-General as depositary reflects the same approach. 448/

Conclusion of section 3: Coexistence of monitoring mechanisms

252. In conclusion, it would seem that:

1. While, as far as their content is concerned, the human rights treaties are not of such a special nature as to justify applying to them a different reservations regime, the establishment, by most of these treaties, of monitoring bodies influences the modalities of determination of the permissibility of reservations;

2. Although no provision is made for this in their statutes, these bodies have undertaken to determine the permissibility of reservations to their constituent instruments. Their competence to do so must be recognized; it is a prerequisite for the exercise of the general monitoring functions with which they are invested;

3. Like the contracting parties themselves in their relations inter se or any other bodies which may have competence to settle disputes, the monitoring bodies determine the permissibility of reservations to human rights treaties on the basis of the criterion of the Treaty's object and purpose, thus confirming the adaptation to these instruments of the flexible reservations regime provided for in the 1969 and 1986 Conventions;

446/ See W.A. SCHABAS, op. cit. (footnote 118), pp. 76-77.

447/ E.C.H.R. Yearbook, 1988, vol. 31, p. 5. Switzerland even modified its declaration again the following year and Liechtenstein - whose own, identical declaration had nevertheless not been declared invalid by the court - did likewise in 1992 (see W.A. SCHABAS, op. cit. (footnote 118), p. 77).

448/ Following several objections, the Government of the Libyan Arab Jamahiriya informed the Secretary-General on 5 July 1995 of its intention to "modify by making more specific" the general reservation it had formulated on its accession to the Convention on the Elimination of All Forms of Discrimination against Women. The Secretary-General communicated this modification (see ST/LEG/SR.E/24, pp. 172 and ...-182, footnote 21), without this giving rise to any objection or criticism. (See also the Finnish Government's notification to the Secretary-General dated 10 February 1994 to amend, by reducing its scope, a reservation to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 26 October 1961 ibid, p. 670).

4. The legal force of the findings made by these bodies in the exercise of this determination power cannot exceed that resulting from the powers given them for the performance of their general monitoring role; in all cases, however, the States must examine these findings in good faith and, where necessary, rectify the factors found to exist which render the reservation impermissible;

5. No organ for determining the permissibility of reservations can take the place of the reserving State in determining the latter's intentions regarding the scope of the treaty obligations it is prepared to assume. The State alone, therefore, is responsible for deciding how to put an end to the defect in the expression of its consent arising from the impermissibility of the reservation;

6. This "action to ensure conformity" may consist simply in withdrawal of the inadmissible reservation or in its modification.

CONCLUSIONS OF CHAPTER II

253. In view of the importance of the problems raised by the recent practice of the human rights treaty monitoring bodies with regard to reservations and the extent of the controversy this practice has generated, the Special Rapporteur has thought it necessary to depart somewhat from his announced intentions at the time of submission of his preliminary report, regarding the order of dealing with the various issues raised by the question of "reservations to treaties". He believes it necessary for the International Law Commission to present in this debate the viewpoint of general international law, of which it is one of the organs, a debate that is sometimes obscured, and in any event distorted, by certain approaches, that are sometimes adopted with the best of intentions, but which, being too sectorial, tend to exaggerate the special aspects of particular areas, particular branches of law and particular treaties, to the detriment of the unity of the rules of international law.

254. Unity is not, of course, an end in itself and it is quite conceivable to envisage applying diverse rules to different situations when the situations so justify. Reservations to treaties do not, however, seem to require such a normative diversification: the existing regime is characterized by its flexibility and its adaptability and it achieves satisfactorily the necessary balance between the conflicting requirement of the integrity and the universality of the Treaty.

255. Whatever may have been said or written on the subject, this objective of equilibrium is universal. Whatever its object, a treaty remains a treaty and expresses the will of the States (or international organizations) that are parties to it. The purpose of the reservations regime is to enable these wishes of States to be expressed in a balanced fashion and it succeeds in doing so in a generally satisfactory manner. It would be unfortunate to bring the regime into question by attaching undue importance to sectorial considerations that can perfectly well be accommodated within the existing regime.

256. This general conclusion must nevertheless be tempered by two considerations:

- First, it is undeniable that the law was not frozen in 1951 or in 1969; 449/ issues which did not arise (or scarcely arose) at that time have since emerged and call for answers. The Special Rapporteur believes that the answers must be found in the spirit of the "Vienna Rules", although these will have to be adapted and extended, as appropriate, whenever this is found to be necessary;

- Secondly, it should be borne in mind that the normal way of adapting the general rules of international law to particular needs and circumstances is to adopt appropriate rules by the conclusion of treaties. In the area of reservations, this can easily be done through the adoption of derogating reservations clauses, if the parties see a need for this.

449/ See Preliminary Report (footnote 2 above), paras. 161 and 162.

257. More specifically, no determining factor seems to require the adoption of a special reservations regime for normative treaties, or even for human rights treaties. The special nature of the latter was fully taken into account by the Judges in 1951 and the "codifiers" of later years and it did not seem to them to justify an overall derogating regime. This view is shared by the Special Rapporteur.

258. There is reason to believe, however, that the drafters of the Vienna Conventions never envisaged the role which the bodies for monitoring the implementation of certain treaties would later have to play, especially in the area of protection of human rights, in applying the reservations regime which they established. This role can in fact be quite easily circumscribed by the application of general principles of international law and by taking account of both the functions of a reservations regime and the responsibilities vested in those bodies.

259. There are thus, however, two circumstances - the second one in particular - that may justify the adoption of special reservation clauses, a measure that will in any case help to avoid sterile controversy.

260. In the light of the forgoing, it seems to the Special Rapporteur that the Commission would be fully performing its role of promoting the progressive development of international law and its codification, 450/ by adopting a resolution addressed to the General Assembly, which the latter might wish to bring to the attention of States and the various parties concerned, in the hope of clarifying the legal aspects of the matter. It is in this spirit that he has prepared the draft resolution reproduced below.

DRAFT RESOLUTION OF THE INTERNATIONAL LAW COMMISSION ON RESERVATIONS TO NORMATIVE MULTILATERAL TREATIES INCLUDING HUMAN RIGHTS TREATIES

The International Law Commission,

Having considered, at its forty-eighth session, the question of the unity or diversity of the juridical regime for reservations,

Aware of the discussion currently taking place in other forums on the subject of reservations to normative multilateral treaties, and particularly treaties concerning human rights,

Desiring that the voice of international law be heard in this discussion,

1. Reaffirms its attachment to the effective application of the reservations regime established by articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986, and particularly to the fundamental criterion of the object and purpose of the treaty as the fundamental criterion for determining the permissibility of reservations;

450/ See article 1 of the Statute.

2. Considers that, because of its flexibility, this regime is suited to the requirements of all treaties, of whatever object or nature, and achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty;

3. Considers that these objectives apply equally in the case of reservations to normative multilateral treaties, including treaties in the area of human rights and that, consequently, the general rules enunciated in the above-mentioned Vienna Conventions are fully applicable to reservations to such instruments;

4. Nevertheless considers that the establishment of monitoring machinery by many human rights treaties creates special problems that were not envisaged at the time of the drafting of those conventions, connected with determination of the permissibility of reservations formulated by States;

5. Also considers that, although these treaties are silent on the subject, the bodies which they establish necessarily have competence to carry out this determination function, which is essential for the performance of the functions vested in them, but that the control they can exercise over the permissibility of reservations does not exclude the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate, by the organs for settling any dispute that may arise concerning the implementation of the treaty;

6. Is also firmly of the view that it is only the reserving State that has the responsibility of taking appropriate action in the event of incompatibility of the reservation which it formulated with the object and purpose of the treaty. This action may consist in the State either forgoing becoming a party or withdrawing its reservation, or modifying the latter so as to rectify the impermissibility that has been observed;

7. Calls on States to cooperate fully and in good faith with the bodies responsible for determining the permissibility of reservations, where such bodies exist;

8. Suggests that it would be desirable if, in future, specific clauses were inserted in multilateral normative treaties, including human rights treaties, in order to eliminate any uncertainty regarding the applicable reservations regime, the power to determine the permissibility of reservations enjoyed by the monitoring bodies established by the treaties and the legal effects of such determination;

9. Expresses the hope that the principles enunciated above will help to clarify the reservations regime applicable to normative multilateral treaties, particularly in the area of human rights; and

10. Suggests to the General Assembly that it bring the present resolution to the attention of States and bodies which might have to determine the permissibility of such reservations.